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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5704

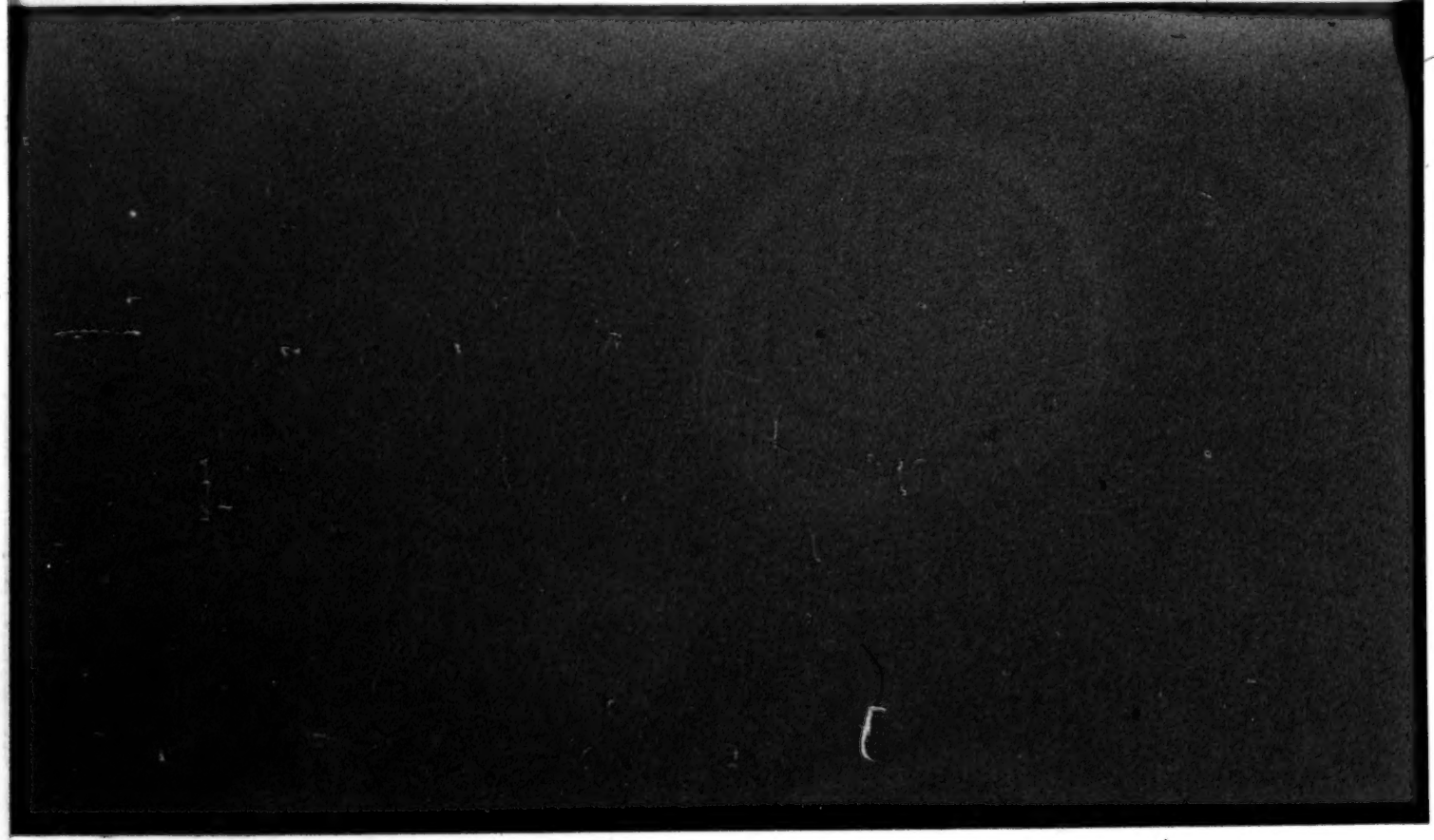
JEAN CHRISTIAN and VICTOR L. GREEN,
Appellants,

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT; its Industrial Commissioner, LOUIS L. LEVINE; UNITED STATES DEPARTMENT OF LABOR, its Secretary, PETER J. BRENNAN; UNITED STATES POSTAL SERVICE CORPORATION; its Postmaster General, ELMER T. KLASSEN; UNITED STATES CIVIL SERVICE COMMISSION; its Chairman, ROBERT E. HAMPTON, and its Commissioners, JAMES E. JOHNSON and JAYNE SPAIN; UNITED STATES DEPARTMENT OF THE TREASURY; and its Secretary, GEORGE P. SHULTZ,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED NOVEMBER 14, 1972
PROBABLE JURISDICTION NOTED APRIL 16, 1973



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INDEX TO APPENDIX

	Page
Relevant Docket Entries	1
Amended Complaint—Class Action	4
Affidavit of Jean Christian Attached to Amended Complaint	15
Exhibit A to Christian Affidavit: Notice of Determination	19
Exhibit B to Christian Affidavit: Referee Decision and Notice of Decision	21

Page

Amended Complaint—Class Action—Continued
Affidavit of Jean Christian Attached to Amended Complaint—Continued
Exhibit C to Christian Affidavit: Statement of Industrial Commissioner In Support of His Appeal from Referee Decision 23
Exhibit D to Christian Affidavit: Appeal Board Decision 27
Affidavit of Victor L. Green Attached to Amended Complaint 29
Exhibit A to Green Affidavit: Notice of Determination 31
Answer of Federal Defendants Department of Labor, James D. Hodgson, Postal Service Corporation, Elmer T. Klassen, Civil Service Commission, Robert E. Hampton, James E. Johnson, and Jayne Spain to Amended Complaint 33
Answer of the State Defendants to Amended Complaint 36
Plaintiffs' Notice of Motion for Summary Judgment or for Three-Judge Court and Summary Judgment 40
Statement of Material Facts as to which Plaintiffs Contend There is no Genuine Issue to be Tried 42
Federal Defendants' Notice of Motion to Dismiss or for Summary Judgment 50
Statement of Material Facts as to which the Federal Defendants Contend There is no Genuine Issue to be Tried 51
Exhibit B to Statement of Material Facts: Notice of Separation to Victor L. Green 52
Exhibit C to Statement of Material Facts: United States Civil Service Commission Denial of Appeal to Victor L. Green 54
Answer of Federal Defendants Department of the Treasury and John Connally to Amended Complaint 56
Order Convening Three-Judge Court 59
Statutory Notice of Three-Judge Court 60
Opinion 62
Notice of Appeal to the Supreme Court of the United States 78
Orders of the Supreme Court of the United States granting motion of appellants for leave to proceed in forma pauperis and noting probable jurisdiction 79-80

Relevant Docket Entries

Civil Docket

UNITED STATES DISTRICT COURT

71 Civ. 5556

Dec. 21, 1971:	Filed Complaint—Class Action.
Dec. 21, 1971:	Filed Order Appointing Process Server (Clerk of Court).
Dec. 21, 1971:	Filed Order to Proceed In Forma Pauperis (Croake, D. J.).
Mar. 10, 1972:	Filed Amended Complaint—Class Action.
Mar. 10, 1972:	Filed Order Appointing Process Server (Clerk of Court).
Mar. 22, 1972:	Filed Plaintiffs' Notice of Motion for a Determination of the Class.
Mar. 22, 1972:	Filed Memorandum of Law in Support of Plaintiffs' Motion for a Determination of the Class.
Mar. 28, 1972:	Filed Answer of Federal Defendants Department of Labor, James D. Hodgson, Postal Service Corporation, Elmer T. Klassen, Civil Service Commission, Robert E. Hampton, James E. Johnson, and Jayne Spain to Plaintiffs' Amended Complaint.
Apr. 10, 1972:	Filed Answer of State Defendants New York State Department of Labor and Louis L. Levine to Plaintiffs' Amended Complaint.
Apr. 17, 1972:	Filed Plaintiffs' Notice of Motion for Summary Judgment or for a Three-Judge Court and Summary Judgment, with attached Statement of Material Facts as to which Plaintiffs Contend There is no Genuine Issue to be Tried.

Relevant Docket Entries

Apr. 17, 1972:	Filed Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment or for a Three-Judge Court and Summary Judgment.
May 12, 1972:	Filed Federal Defendants' Notice of Motion to Dismiss or for Summary Judgment, with attached Statement of Material Facts as to which the Federal Defendants Contend There is no Genuine Issue to be Tried.
May 12, 1972:	Filed Memorandum of Law in Support of Federal Defendants' Motion to Dismiss or for Summary Judgment.
May 16, 1972:	Filed Answer of Federal Defendants Department of the Treasury and John Connally to Plaintiffs' Amended Complaint.
May 18, 1972:	Filed Memorandum for State Defendants.
May 19, 1972:	Filed Plaintiffs' Reply Brief.
May 24, 1972:	Filed Order Designating Paul R. Hays, C. J., and Arnold Bauman, D. J., in addition to Marvin E. Frankel, D. J., to sit as Three-Judge Court (Friendly, C. J.).
May 24, 1972:	Filed Order Setting Hearing Date Before Three-Judge Court (Frankel, D. J.).
May 25, 1972:	Filed Statutory Notice to Convene Three-Judge Court (Clerk of Court).
June 5, 1972:	Filed Memorandum of Law in Support of Federal Defendants' Motion to Dismiss or for Summary Judgment.
June 8, 1972:	Three-Judge Court Convened Before Paul R. Hays, C. J., Marvin E. Frankel, D. J., and Arnold Bauman, D. J. Decision Reserved.
July 24, 1972:	Filed Opinion dismissing the action (Hays, C. J., and Bauman, D. J.) and Dissenting Opinion (Frankel, D. J.).

RELEVANT DOCKET ENTRIES

Sept. 15, 1972:	Filed Notice of Appeal to the Supreme Court of the United States.
Apr. 24, 1973:	Filed Copy of Order of the Supreme Court of the United States.
Apr. 24, 1973:	Filed Copy of Order of the Supreme Court of the United States Noting Probable Jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

71 Civ. 5556

JEAN CHRISTIAN and VICTOR L. GREEN, indivually and on behalf of all others similarly situated, PLAINTIFFS

—against—

NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT; its Industrial Commissioner, LOUIS L. LEVINE; UNITED STATES DEPARTMENT OF LABOR, its Secretary, JAMES D. HODGSON; UNITED STATES POSTAL SERVICE CORPORATION; its Chairman, ROBERT E. HAMPTON, and its Commissioners, JAMES E. JOHNSON and JAYNE SPAIN; UNITED STATES DEPARTMENT OF THE TREASURY; and its Secretary, JOHN CONNALLY, DEFENDANTS

AMENDED COMPLAINT—CLASS ACTION—
Filed March 10, 1972

I.

NATURE OF CLAIM

1. Plaintiffs, individually and on behalf of all others similarly situated, seek declaratory relief, injunctive relief and a *writ of mandamus* to redress the denial of unemployment insurance benefits under the Unemployment Compensation for Federal Employees Program without a fair hearing as required by the Fifth and Fourteenth Amendments to the United States Constitution, by 42 U.S.C. § 1983, by 42 U.S.C. § 1985(3), by 42 U.S.C. § 503 and by 5 U.S.C. §§ 8501-8508.

II.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 2201 and 2202 which authorize the issuance of declaratory judgments, to 28 U.S.C. § 1343(3) granting original jurisdiction to District Courts over actions brought under the United States Constitution, 42 U.S.C. §§ 1983 and 1985 and to 29 U.S.C. § 1361 relating to actions in the nature of *mandamus*.

III.

PLAINTIFFS

3. Plaintiff Jean Christian is forty-five years old, a black citizen of the United States and a resident of Brooklyn, New York. Subsequent to her termination as a federal civilian employee with the United States Post Office Department she was denied unemployment insurance benefits without a fair hearing.

4. Plaintiff Victor L. Green is a citizen of the United States and a resident of Bronx, New York. Subsequent to his termination as a federal civilian employee with the United States Department of the Treasury, he was denied unemployment insurance benefits and has not and will not be given a fair hearing.

IV.

DEFENDANTS

5. Defendant New York State Department of Labor, Division of Employment (hereafter "Division of Employment") is the agency responsible for the administration of unemployment insurance in the State of New York and is a party to an agreement with the United States Department of Labor pursuant to 5 U.S.C. §§ 8501 *et seq.* which authorize the payment of unemployment insurance benefits to federal employees and

deny the right to a fair hearing concerning eligibility for such benefits.

6. Defendant Louis L. Levine is the Industrial Commissioner of the New York State Department of Labor, Division of Employment, and is responsible for the administration of unemployment insurance in the State of New York.

7. Defendant United States Department of Labor (hereafter "Department of Labor") is the agency responsible for the administration of unemployment insurance benefits for federal employees under 5 U.S.C. §§ 8501 *et seq.* and has entered into an agreement with the New York State Department of Labor, Division of Employment, pursuant to 5 U.S.C. §§ 8501 *et seq.* which authorize the payment of unemployment insurance benefits to federal employees and deny to such employees the right to a fair hearing concerning eligibility for such benefits.

8. Defendant James D. Hodgson is the Secretary of the United States Department of Labor and is responsible for the administration of unemployment insurance for federal employees.

9. Defendant United States Postal Service Corporation (hereafter "Postal Service") assumed all obligations and liabilities of the United States Post Office Department, which is the the former employer of Plaintiff Christian and, pursuant to 5 U.S.C. § 8506 and the regulations promulgated thereunder by the Department of Labor, it transmitted information to the Defendant Division of Employment concerning the reason for the termination of Plaintiff Christian's employment.

10. Defendant Elmer T. Klassen is Postmaster General of the United States Postal Service Corporation and is responsible for the transmission of information to state unemployment insurance agencies such as the Defendant Division of Employment.

11. Defendant United States Civil Service Commission (hereafter the "Civil Service Commission") is responsible for the administration and regulation of working and termination procedures for federal employees.

12. Defendant Robert E. Hampton is the Chairman of the United States Civil Service Commission and, in conjunction with Defendants Johnson and Spain, is responsible for the administration of federal employee procedures.

13. Defendant James E. Johnson is a Commissioner of the United States Civil Service Commission and, in conjunction with Defendants Hampton and Spain, is responsible for the administration of federal employee procedures.

14. Defendant Jayne Spain is a Commissioner of the United States Civil Service Commission and, in conjunction with Defendants Hampton and Johnson, is responsible for the administration of federal employee procedures.

15. Defendant United States Department of the Treasury ("hereafter "Department of Treasury") is the former employer of Plaintiff Victor L. Green and, pursuant to 5 U.S.C. § 8506 and the regulations promulgated thereunder by the Department of Labor, it transmitted information to the Defendant Division of Employment concerning the reason for the termination of Plaintiff Green's employment.

16. Defendant John Connally is the Secretary of the United States Department of the Treasury, and is responsible for the transmission of information to state unemployment insurance agencies such as the Defendant Division of Employment.

V.

CLASS ACTION

17. Plaintiffs bring this action pursuant to Rules 23 (a) and 23(b)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all persons similarly situated. The class is composed of all federal employees who have been or will be subject to denial or termination of unemployment compensation benefits under the Unemployment Compensation for Federal Employees (hereafter "UCFE") Program on the basis of findings of fact

by former federal employers which are conclusive and binding on the New York State Department of Labor, Division of Employment without a fair hearing. The class is so numerous that joinder of all members of the class would be impracticable. Upon information and belief, the class consists of at least 4,000 individuals.

Plaintiffs are former employees of federal employers who were denied benefits on the basis of factual findings made without a hearing by their employers. Benefits were denied Plaintiffs because the New York State Department of Labor, Division of Employment gave final and conclusive effect to the findings of Plaintiffs' employers. Thus Plaintiffs will fairly and adequately protect the interests of the class they represent in this action.

The questions of law common to the members of the class are the conformity of the practice of denying fair hearings to federal employees who apply for unemployment insurance with the requirements of the Fifth and Fourteenth Amendments of the United States Constitution and the Social Security Act. The question of fact common to the members of the class are whether or not such persons were terminated on the basis of findings of fact on which the hearings were held.

The Defendants in following a policy which deprives the members of the class of a fair hearing have acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive and declaratory relief.

VI.

STATEMENT OF THE CLAIM

18. Plaintiff Christian was a probationary employee with the United States Post Office Department from April 4, 1970, to October 2, 1970.

19. On October 2, 1970, Plaintiff Christian was discharged by the Post Office Department because of an allegedly unsatisfactory attendance record.

20. The Post Office Department's alleged reason for the termination of Plaintiff Christian's employment was that she had been absent without notifying the Post Office Department on August 31 and September 1, 1970.

21. Plaintiff Christian filed an original claim with the Defendant Division of Employment under the UCFE Program, 5 U.S.C. §§ 8502, 8506, on October 3, 1970.

22. By initial determination effective October 3, 1970, the Defendant Division of Employment ruled that Plaintiff Christian was disqualified because she had voluntarily left her employment without good cause by provoking her discharge.

23. This initial determination was based on reports made by the Post Office Department stating that Plaintiff Christian's employment was terminated during her probationary period because of her unsatisfactory attendance record and her absences on August 31 and September 1, 1970 without notifying the Post Office Department as to such absences.

24. The initial determination was reversed by Referee Milton Weinstein of the Division of Employment on January 8, 1971, after a full hearing in which the Industrial Commissioner and the Plaintiff were heard.

25. Referee Weinstein found that:

> "Claimant's parental responsibilities required her absence from work on August 31 and September 1. Having had the employer advised of the reason for her absence she did not willfully act in a manner to provoke her discharge. She did not voluntarily leave her employment."

26. Referee Weinstein did not accord "final and conclusive" weight to the findings of the Post Office Department as required by 5 U.S.C. § 8506.

27. An appeal was taken from the Referee's decision to the Appeal Board of the New York State Department of Labor, Division of Employment. The Board is charged with review of determinations by the Referees of the Division of Employment.

28. The Appeal Board reversed Referee Weinstein's decision and upheld the initial determination. In its deci-

sion, dated April 16, 1971, the Appeal Board stated that it was bound, under 5 U.S.C. § 8506, by the federal agency's findings and that Plaintiff Christian had provoked her discharge, which was tantamount to a voluntary leaving of employment without good cause.

29. The decision of the Appeal Board is final on all questions of fact under New York unemployment insurance law.

30. By Act of Congress effective primarily on July 1, 1971, the United States Post Office Department became the Defendant United States Postal Service Corporation, under which Act the latter assumed all the obligations and liabilities of the former, and under which Act the latter remains a federal agency bound by the requirements of 5 U.S.C. § 8506 and the regulations promulgated thereunder.

31. Plaintiff Christian was not afforded a hearing by the Defendant Civil Service Commission. Under 5 C.F.R. § 315.806, issued pursuant to 5 U.S.C. §§ 1301, 3301, 3302 and Executive Orders 10577 and 11103, a probationary federal employee is given no hearing on the grounds for termination of employment unless discrimination or improper termination procedure is alleged.

32. Plaintiff Christian was not afforded a hearing by either the Post Office Department or the Department of Labor. Under the UCFE Program, the employing agency makes findings of fact, including reasons for termination, and furnishes them to the Division of Employment. 5 U.S.C. § 8506.

33. 5 U.S.C. § 8506 also provides that these findings of fact made by the employing federal agency are to be "final and conclusive" upon the state agency determining the eligibility of a federal employee for unemployment insurance. The Department of Labor regulations governing this procedure, 20 C.F.R. §§ 609.9 *et seq.*, provide only for a review of the federal agency findings, but not for a hearing. 20 C.F.R. § 609.18, as amended, July, 1971, provides for federal agency hearings over contested facts only where an employee has resigned.

34. The New York State Department of Labor, Division of Employment, Appeal Board did not afford Plain-

tiff Christian a hearing concerning the reasons for her termination. The Board found itself bound by the federal agency's findings of fact, in accord with 5 U.S.C. § 8506 and 20 C.F.R. § 609.18 and thereby rejected the *de novo* findings of the Referee.

35. Plaintiff Green was a probationary employee with the Defendant United States Department of the Treasury from December 24, 1970, to December 18, 1971.

36. During his employment, Plaintiff Green was based in New York as a skymarshall for the Bureau of Customs of the Defendant Department of the Treasury.

37. On December 18, 1971, Plaintiff Green was discharged by the Defendant Department of the Treasury for the alleged reason of drinking an alcoholic beverage within twenty-four hours of flying.

38. Plaintiff Green filed an original claim with the Defendant Division of Employment, under the UCFE Program, 5 U.S.C. §§ 8502, 8506, on December 23, 1971.

39. By initial determination effective on February 17, 1972, the Defendant Division of Employment ruled that Plaintiff Green was disqualified because he had engaged in misconduct by drinking an alcoholic beverage within twenty-four hours of flying.

40. This initial determination was based upon reports made by the Defendant Department of the Treasury stating that Plaintiff Green was terminated during probation and that Plaintiff Green was terminated for drinking an alcoholic beverage within twenty-four hours of flying.

41. Plaintiff Green received a Notice of Determination from the Defendant Division of Employment which advised him that he had been disqualified from receiving benefits, and that he had a right to a hearing before the Defendant Division of Employment. He was also advised orally, however, that the findings of fact made by the Defendant Department of the Treasury were final and conclusive upon the Defendant Division of Employment.

42. Plaintiff Green was not afforded a hearing by the Defendant Civil Service Commission. Under 5 C.F.R. § 315.806, issued pursuant to 5 U.S.C. §§ 1301, 3302 and Executive Orders 10577 and 11103, a probationary fed-

eral employee is given no hearing on the grounds for termination of employment unless discrimination or improper termination procedure is alleged.

43. Plaintiff Green was not afforded a hearing by either the Defendant Department of the Treasury or the Defendant Department of Labor. Under the UCFE Program, the employing federal agency, the Defendant Department of Labor, makes findings of fact, including reasons for termination, and furnishes them to the Division of Employment. 5 U.S.C. § 8506.

44. 5 U.S.C. § 8506 also provides that these findings of fact made by the employing federal agency are to be "final and conclusive" upon the state agency determining the eligibility of a federal employee for unemployment compensation insurance. The Department of Labor regulations governing this procedure, 20 C.F.R. §§ 609.9 *et seq.*, provide only for a review of the federal agency findings, but not for a hearing. 20 C.F.R. § 609.18, as amended, July, 1971, provides for federal agency hearings over contested facts only where an employee has resigned.

45. The New York State Department of Labor, Division of Employment will not afford Plaintiff Green a hearing concerning the reasons for his termination, to the extent that the Division of Employment considers itself bound by the federal agency's findings of fact, in accord with 5 U.S.C. § 8506 and 20 C.F.R. § 609.18.

First Cause of Action

46. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Second Cause of Action

47. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of their right to equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Third Cause of Action

48. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of 42 U.S.C. § 1983.

Fourth Cause of Action

49. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of 42 U.S.C. § 1985.

Fifth Cause of Action

50. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of the mandate and intent of 5 U.S.C. §§ 8501-8506 and 42 U.S.C. § 503.

Prayer for Relief

Wherefore, Plaintiffs respectfully pray that this Court:

1. Assume jurisdiction of this cause, convene a three-judge District Court pursuant to 28 U.S.C. §§ 2282 and 2284 to determine this controversy and set this case promptly for a hearing.

2. Enter a declaratory judgment declaring Defendants' denial of Plaintiffs' unemployment insurance benefits without a fair hearing to be in violation of Due Process and Equal Protection, of 42 U.S.C. §§ 503, 1983 and 1985 and of 5 U.S.C. §§ 8501-8506.

3. Enter a preliminary and permanent injunction restraining Defendants from administering the UCFE Program so as to deny Plaintiffs and the members of their class a fair hearing, and restraining Defendants from denying unemployment insurance benefits due to and withheld from the Plaintiffs and the members of their class.

4. Enter an Order in the nature of *mandamus* compelling the federal Defendants to administer the UCFE program so as to grant Plaintiffs and the members of their class fair hearings.

5. Grant such other and further relief as this Court may find just, equitable and proper.

Dated: March 10, 1972
New York, New York

Respectfully submitted,

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Attorneys for Plaintiffs

AFFIDAVIT OF JEAN CHRISTIAN ATTACHED TO AMENDED COMPLAINT

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

JEAN CHRISTIAN, being duly sworn, deposes and says:

1. I reside at 81 DeSales Place, Brooklyn, New York with my minor daughter.

2. From April 4, 1970, to October 2, 1970, I was employed in the federal service as a Chauffeur for the United States Post Office in Brooklyn, New York.

3. On October 2, 1970, during my probationary period, my federal employment was terminated, and on October 3, 1970, I made original claim for unemployment insurance benefits.

4. On information and belief, on November 5, 1970, the Post Office transmitted findings to the state unemployment insurance agency which gave as the reasons for separation from federal service 1) termination during probation; and 2) unexcused absences on August 31, 1970, and September 1, 1970 together with an unsatisfactory attendance record.

5. On or about November 6, 1970, the Industrial Commissioner of the State of New York made an initial determination disallowing unemployment insurance benefits to me on the grounds that I had voluntarily left employment without good cause in that I provoked my discharge by my absences of August 31, 1970, and September 1, 1970, and further, that the federal findings were final, conclusive, and binding. (See copy of Notice of Determination attached hereto as Exhibit "A").

6. The aforesaid Notice of Determination advised me that I had the right to a hearing but at the same time stated that the facts found by the Post Office were final, conclusive, and binding.

7. On November 12, 1970, I requested a hearing from the state unemployment insurance agency on the ground

that the termination of my employment was unfair, I was denied a hearing by the federal agency, and I had good reason for being absent.

8. As a probationary employee of the Post Office, I had a limited right of appeal to the Civil Service Commission on the issue of my termination, an appeal which was confined to consideration of charges of discrimination and improper procedure. § 315.80 6, Civil Service Regulations. This appeal was not available to challenge the federal findings as they might relate to claims for unemployment insurance.

9. On December 16, 1970, a hearing was held before a Referee designated by the state agency. The federal agency did not appear. The Industrial Commissioner submitted a statement in lieu of appearance which on information and belief, alleged that I had provoked my discharge because of my attendance record, and that the findings of the federal agency must be accepted as fact. I testified on my own behalf.

10. On January 8, 1971, a decision was rendered by the Referee overruling the initial determination and granting my claim for benefits. The Refree held that I had not provoked my discharge, that I had good excuse for my absences, and had duly explained my absences to my employer. (See Copy of Referee's decision attached hereto as Exhibit "B").

11. The Industrial Commissioner appealed the decision of the Referee to the Unemployment Insurance Appeal Board and urged that the Referee be reversed on the ground that the findings of the federal agency were final and conclusive and these findings led to the conclusion, under New York State unemployment insurance law, that I had provoked my discharge. (See copy of letter of Industrial Commissioner submitted in support of his appeal, attached hereto as Exhibit "C").

12. On April 16, 1971, the Appeal Board reversed the Referee holding that the federal findings were final, conclusive, and binding, and based on these findings, I had provoked my discharge. (See copy of the Decision of the Appeal Board attached hereto as Exhibit "D").

13. On August 4, 1970, I had been placed on the "restricted sick leave list" by the Post Office Department, because of three allegedly unexplained absences reported by my supervisor, Mr. Gross. Being placed on the restricted list meant that if I were absent again, I would be required to produce a medical excuse or be deemed AWOL, and penalized accordingly.

14. On the occasions when I was accused of being AWOL, I had explained to my supervisor that I was unable to report my absences because my telephone was out of order. To report an absence, I would have had to telephone my employer at about 6:00 A.M. and it was impossible for me to find a working public phone in my neighborhood at that hour.

15. On August 31, 1970 and September 1, 1970, I did not go to work because my minor daughter, who was my sole responsibility, required my assistance. On August 30, 1970, a Sunday, I learned that my daughter had become pregnant and was seeking an illegal abortion. She was not at home on Sunday. It then became imperative for me to find my daughter to dissuade her from taking this drastic step. I began my search for her on Sunday, without success and continued my search throughout the early morning hours of Monday August 31. Not knowing where I would be at the time I would have to report to my employer, I asked my older daughter (aged 25) who did not live at home to telephone my supervisor to report my absence. My older daughter advised me later that she had telephoned as requested, but that the person who answered the telephone at the Post Office refused to listen to the explanation and told her that I should bring in a doctor's note.

16. I located my minor daughter late in the afternoon of August 31, and found her to be in a very distressed state. I made the decision not leave her in such a state until I was assured that she would take the rash step she had been contemplating. It was not until the afternoon of September 1, 1970 that I was confident that I could leave her without fear for her safety. I again requested my older daughter to telephone my employer

for me on the morning of September 1, which she told me she had done with the same result.

17. When I returned to work on September 2, 1970, I attempted to explain my absences to my supervisor, but he refused to speak with me.

18. I was never given an opportunity by the Post Office or the Civil Service Commission for a hearing during which I could challenge the findings of the Post Office that I had been AWOL on August 31 or September 1, 1970, or on the prior occasions, My supervisor who reported me AWOL refused to listen to my explanations and I was never permitted to confront him before an impartial official of the agency, the Civil Service Commission, or the State unemployment insurance agency.

19. Although I was given a hearing by the state unemployment insurance agency that hearing was not a fair hearing because the federal findings were final conclusive and binding, and the favorable decision of Referee could not therefore, be accorded full weight by the Appeal Board.

20. I have been grievously harmed by being denied unemployment insurance benefits without a fair hearing in that I was deprived of a source of income which I sorely needed after I was separated from federal employment, without due process of law.

21. On information and belief, I would not have been denied unemployment insurance benefits if I had been given a fair hearing and an opportunity to challenge the federal findings in my case because I had a sound and reasonable excuse for being absent on the days in question, and I duly reported my absences, as was found by the Referee.

22. I believe that there are other persons similarly situated to myself who have been denied unemployment compensation for federal employees upon disputed federal findings without being given a fair hearing, and that I can fairly represent the class of such persons.

/s/ Jean Christian
JEAN CHRISTIAN

[Notary Omitted]

EXHIBIT A TO CHRISTIAN AFFIDAVIT:
NOTICE OF DETERMINATION

NEW YORK STATE DEPARTMENT OF LABOR
Division of Employment

NOTICE OF DETERMINATION TO CLAIMANT

Jean Christian
81 DeSales Place
Brooklyn, N.Y. 11207

Local Office Address: Local Office 516
52 West 20th Street
New York, N. Y. 10011

☐ Given
☒ Mailed

Date 11-6-70

050-44-1433
S.S. Acct. No.

No unemployment insurance benefits can be paid to you for the period beginning 10/3/70 until you have subsequently worked for an employer not less than 3 days in each of 4 weeks or earned at least $200. Self-employment and earnings from self-employment will not count.

DETERMINATION [Hand Written] You quit your job without good cause.

Local Office Address

Local Office 516
52 West 20th Street
New York, N. Y. 10011

Jean Christian
81 DeSales Place
Brooklyn, N.Y. 11207

☐ Given
☒ Mailed

Date 11-6-70

050-44-1433
S.S. Acct. No.

No unemployment insurance benefits can be paid to you for the period beginning 10/3/70 until you have subsequently worked for an employer not less than 3 days in each of 4 weeks or earned at least $200. Self-employment and earnings from self-employment will not count.

DETERMINATION [Hand Written] You quit your job without good cause.

REASON This determination is based on the following: [Hand Written] You provoked your discharge as you were AWOL 8/31/70 & 9/1/70 after warning. A provoked discharge is equivalent to voluntary leaving of employment without good cause. The fact finding done by the federal agency (PO) is final, conclusive and binding under Unemployment Ins. Law.

RENEWING YOUR CLAIM If you are satisfied that this determination is correct, you may apply to renew your claim by reporting to this local office if you are unemployed and believe that you have satisfied the above requirement of subsequent work or earnings.

RIGHT TO A HEARING IF YOU ARE NOT SATISFIED WITH THIS DETERMINATION, YOU MAY ASK FOR A HEARING BEFORE AN IMPARTIAL REFEREE AT NO COST OR OBLIGATION TO YOU.

REQUEST FOR HEARING HOWEVER, YOUR REQUEST MUST BE MADE IN PERSON OR BY MAIL AT THIS LOCAL OFFICE NOT LATER THAN 30 DAYS FROM THE DATE OF THIS NOTICE.

When requesting a hearing, be sure to bring or mail your Insurance Book, Insurance Book Calendar Insert and Claim Card, if issued, with your request.

REPORTING TO PROTECT YOUR RIGHTS until the referee decides the case, CONTINUE TO REPORT to your insurance and employment offices on your assigned days as long as you remain unemployed.

FOR THE INDUSTRIAL COMMISSIONER

By [Illegible]

LO 412.1 (9-69) (over)

19

NOTICE TO EMPLOYER OF DETERMINATION
THAT CLAIMANT IS INELIGIBLE

Date
Mailed_____

TO EMPLOYER:

It has been determined that the claimant on the other side of this form is ineligible for benefits for the period and for the reason shown. However, if the claimant becomes unemployed after meeting the requirements of employment mentioned on the reverse, he will have the right to file a new claim and may thereafter be eligible for benefits.

☐ This notice supersedes the one sent you dated:_____

The cooperation which you have extended to us in furnishing information is appreciated.

FOR THE INDUSTRIAL COMMISSIONER

By_____

Section 620.1 of the Unemployment Insurance Law states in Part:

"(a) A claimant who is dissatisfied with an initial determination of the claim for benefits or any other party affected by such determination may, within thirty days after the mailing or personal delivery of notice of such determination, request a hearing . . ."

EXHIBIT B TO CHRISTIAN AFFIDAVIT:
REFEREE DECISION AND NOTICE OF DECISION

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE REFEREE SECTION

500 Eighth Avenue
New York, N.Y. 10018

[Illegible]

UNDER CHAPTER 85, TITLE 5, OF THE U.S. CODE

DECISION AND NOTICE OF DECISION

In the Matter of:

Jean Christian
81 De Sales Place
Brooklyn, New York 11207

Referee # UCFE-589-70

S.S.# 050-44-1433

DECISION MAILED AND DULY FILED IN THE DEPARTMENT OF LABOR ON January 8, 1971

Local Office # 516
Division of Employment
52 West 20th Street
New York, New York 10011

Main Post Office
2nd Avenue & 10th
Street
Brooklyn, New York

FINDINGS OF FACT: A hearing was held at which claimant appeared and testified. A statement on behalf of the Industrial Commissioner was submitted in lieu of an appearance.

Claimant, a chauffeur, filed for Federal employee benefits Under Chapter 85, Title 5, of the U.S. Code effective October 5, 1970. By initial determination effective October 3, 1970 she was disqualified for voluntary leaving of employment without good cause by provoking her discharge.

From April to October 2, 1970 claimant worked for a Federal Agency. She was unable to report for work on August 31 because one of her daughters had been absent from their home and claimant spent the day looking for her. Her telephone was not always in working order and at her request another daughter telephoned to the employer and advised that she would not be able to report for work that day. She found her daughter during the day but was unable to report for work on September 1 because both she and her daughter were emotionally upset and claimant spent most of the day counselling and cautioning her daughter. At her request her other daughter again called the employer on September 1 and advised that she would be absent that day.

Claimant subsequently received a letter from an officer of the employer in

NEW YORK, N.Y. 10018

[Illegible]

UNDER CHAPTER 85, TITLE 5, OF THE U.S. CODE

DECISION AND NOTICE OF DECISION

In the Matter of:

Jean Christian
81 De Sales Place
Brooklyn, New York 11207

N
Referee # UCFE-589-70

S.S.# 050-44-1433

DECISION MAILED AND DULY FILED IN THE DEPARTMENT OF LABOR ON January 8, 1971

Local Office # 516
Division of Employment
52 West 20th Street
New York, New York 10011

Main Post Office
2nd Avenue & 10th Street
Brooklyn, New York

FINDINGS OF FACT: A hearing was held at which claimant appeared and testified. A statement on behalf of the Industrial Commissioner was submitted in lieu of an appearance.

Claimant, a chauffeur, filed for Federal employee benefits Under Chapter 85, Title 5, of the U.S. Code effective October 5, 1970. By initial determination effective October 3, 1970 she was disqualified for voluntary leaving of employment without good cause by provoking her discharge.

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Claimant subsequently received a letter from an officer of the employer in charge that he had received a report from her supervisor stating that she had been absent without official leave on August 31, 1970 and September 1, 1970 and that she failed to notify her place of assignment of her intended absence, and that in view thereof her employment would be terminated during probation at

the close of business October 2, 1970. Claimant attempted to have her union intercede but was unsucessful. The employer reported on Form-FL-2N the reason for separation as "Termination during probation".

OPINION: Claimant's parental responsibilities required her absence from work on August 31 and September 1. Having had the ~~employer~~ employer advised of the reason for her absence she did not wilfully act in a manner to provoke her discharge. She did not voluntarily leave her employment.

DECISION: The initial determination is overruled.

/s/ MILTON E. WEINSTEIN
Referee

amb

EXHIBIT C TO CHRISTIAN AFFIDAVIT:
STATEMENT OF INDUSTRIAL COMMISSIONER
IN SUPPORT OF HIS APPEAL FROM REFEREE DECISION

PUBLIC EMPLOYMENT SERVICE
SERVICE FOR EVERYONE
LOCAL—STATE—NATIONAL

STATE OF NEW YORK
DEPARTMENT OF LABOR
DIVISION OF EMPLOYMENT

500 Eighth Avenue—New York, New York 10018
Tel. 563-7660

COUNSEL'S OFFICE

March 2, 1971

New York State Unemployment
Insurance Appeal Board
500 Eighth Avenue
New York, New York 10018

Re: Jean Christian
S.S. No. 050-44-1433
Case No. UCFE-589-70
A.B. No. 162, 874 F

Gentlemen:

The Industrial Commissioner submits this statement in support of his appeal from the decision of the referee filed January 8, 1971 overruling an initial determination disqualifying claimant effective October 3, 1970 for voluntary leaving of her employment without good cause by provoking her discharge.

The issue presented is whether claimant pursued a course of conduct which she knew or should have known would cause her discharge from her employment, and whether claimant was subject to disqualification pursuant to Section 593.1 of the Unemployment Insurance Law.

Claimant was employed by a federal agency from April 3, 1970 to October 2, 1970. She filed for benefits under Chapter 85, Title 5 of the United States Code. According to the report of the federal agency, claimant's employment was terminated during her probationary period because of her unsatisfactory attendance record, climaxed by her absences on August 31 and September 1, 1970 without notifying the employer as to such absences (See employer's letters dated September 2, and September 8, 1970 in answer to FL 4 and F1 2N). Claimant advised the insurance office that she did not call the employer each time she was absent because she could not get to a telephone that was working; that all the telephones in the neighborhood were not in working order (LO 413 dated 10/19/70). Claimant further contended that she failed to report to work on August 31, and September 1, 1970 because of compelling domestic problems, and that she requested an older daughter, not residing with her, to telephone the employer both August 31, and September 1, and that the daughter did make the telephone calls (smp. 9 and 11). The employer reported that it received no such notification of claimant's absences on August 31, and September 1, 1970. The record further establishes that claimant had a poor attendance record, and had been warned by the employer with reference to same. As of August 4, claimant was on a restricted list so that if she were absent even one more day, claimant needed a medical substantiation. It should be noted that during the period in issue, claimant was during her probationary period.

The Appeal Board has held that the findings of fact by a federal agency as to the reasons for termination of employment are final, binding and conclusive on both the referee and the Appeal Board (UCFE-1708). In the instant case, it is submitted that the findings of fact as outlined by the Post Office are such that lead to but one conclusion, to wit, that claimant had a poor attendance record; had been warned with reference to same; was absent on August 31, and September 1 without notification to the employer and was discharged during her

probationary period. Under the circumstances, claimant knew or should have known that such conduct on her part, especially during her probationary period, would lead to her discharge and claimant is, therefore, subject to disqualification pursuant to Section 593.1 of the Labor Law (See *Matter of Malaspina*, 309 N.Y. 413, affirming 285 App. Div. 564, reversing A.B. #42,606).

For the reasons stated, the decision of the referee should be reversed.

Very truly yours,

HYMAN AMSEL
Counsel

By: /s/ Herman Sakoloff

HS:ems

cc: Jean Christian
Mr. Memelsdorff

EXHIBIT D TO CHRISTIAN AFFIDAVIT:
APPEAL BOARD DECISION

Harry Zankel
Chairman
Isidore Schechter
John A. Rogalin
James R. Rhone
Gregory J. Pope
Members

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE APPEAL BOARD

500 Eighth Avenue
New York, N.Y. 10018

Ramon L. Tinacehd
Executive Secretary

LOngacre 3-7660

Jean Christian
81 De Sales Place
Brooklyn, New York 11207

S.S.A. # 050-44-1433 Appeal #162,874F

Referee # UCFE-589-70

Division of Employment
Local Insurance Office
#516
52 West 20th Street
New York, New York 10011

PLEASE TAKE NOTICE that the decision set forth below was mailed and filed in the Department of Labor on Apr. 16, 1971

Main Post Office
2nd Avenue & 10th Street
Brooklyn, New York

PLEASE TAKE FURTHER NOTICE that within thirty days after the mailing of this decision, the Commissioner or any other party affected thereby who appeared at the appeal before the Board may appeal questions of law involved in such decision to the Appellate Division of the Supreme Court, Third Department. Written notice of such appeal should be mailed to the Unemployment Insurance Appeal Board, 500 Eighth Avenue, New York, N.Y. 10018, within the time above stated.

DECISION OF THE BOARD

PRESENT: John A. Rogalin, Harry Zankel
Members

The Industrial Commissioner appeals from the decision of the referee filed January 8, 1971, overruling the initial determination of the local office disqualifying claimant, a former Federal employee filing for unemployment compensation under Chapter 85, Title 5 of the United States Code, from receiving benefits effective October 3, 1970, because she voluntarily left her employment without good cause by provoking her discharge.

A hearing was held before the referee at which all parties were accorded a full opportunity to be heard and at which claimant appeared and testimony was taken. A written statement was submitted by the Industrial Commissioner in lieu of appearance at such hearing. The Board considered a written statement submitted on behalf of the Industrial Commissioner on appeal.

Based on the record and testimony in this case, the Board makes the following

Chairman
Isidore Schechter
John A. Rogalin
James R. Rhone
Gregory J. Pope
Members

UNEMPLOYMENT INSURANCE APPEAL BOARD

500 Eighth Avenue
New York, N.Y. 10018

LOngacre 3-7660

Ramon L. Tinacehd
Executive Secretary

Jean Christian
81 De Sales Place
Brooklyn, New York 11207

S.S.A. # 050-44-1433 Appeal #162,874F

Referee # UCFE-589-70

Division of Employment
Local Insurance Office
#516
52 West 20th Street
New York, New York 10011

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DECISION OF THE BOARD

PRESENT: John A. Rogalin, Harry Zankel
Members

The Industrial Commissioner appeals from the decision of the referee filed January 8, 1971, overruling the initial determination of the local office disqualifying claimant, a former Federal employee filing for unemployment compensation under Chapter 85, Title 5 of the United States Code, from receiving benefits effective October 3, 1970, because she voluntarily left her employment without good cause by provoking her discharge.

A hearing was held before the referee at which all parties were accorded a full opportunity to be heard and at which claimant appeared and testimony was taken. A written statement was submitted by the Industrial Commissioner in lieu of appearance at such hearing. The Board considered a written statement submitted on behalf of the Industrial Commissioner on appeal.

Based on the record and testimony in this case, the Board makes the following

FINDING OF FACT: Claimant was employed for a period of six months as a letter carrier by the post office. She was repeatedly reprimanded for her excessive absences, without communicating with her employer. On August 4, 1970, claimant was placed on a "restricted list"

which meant that she must thereafter avoid any further absence, other than for illness. Although claimant alleges that she again had to be absent on August 31 and September 1, 1970, due to family responsibilities, and that her daughter telephoned to the employer on those days and explained the absences, the employer did not receive any telephone call either from the claimant or her daughter. Because of claimant's continued absences without calling in, the employer terminated her services at the end of her probationary period, October 2, 1970. Federal Agency informed the local office that claimant's absences had invariably been on an "A W O L" basis.

OPINION: We are bound by the finding of the Federal agency that claimant was absent on August 31 and September 1, 1970, without notifying the employer. Claimant knew or should have known that these absences without notice would place her employment in jeopardy, especially in view of the warnings she received and that she was still on a probationary status. We hold that claimant provoked her discharge, which was tantamount to a voluntary leaving of employment without good cause.

DECISION: The initial determination of the local office is sustained.

The decision of the referee is reversed.

JOHN A. ROGALIN, Member
HARRY ZANKEL, Member

AFFIDAVIT OF VICTOR L. GREEN ATTACHED TO AMENDED COMPLAINT

STATE OF NEW YORK)
) ss.:
COUNTY OF BRONX)

VICTOR L. GREEN, being duly sworn, deposes and says:

1. I reside at 1547 Commonwealth Avenue, Bronx, New York.

2. From December 24, 1970 to December 18, 1971, I was employed in the federal service as a Skymarshall for the United States Department of the Treasury, Bureau of Customs, based in New York.

3. On December 14, 1971, during by probationary period, my federal employment was terminated, and on December 23, 1971, I made original application and claim for unemployment insurance benefits.

4. On information and belief, the Department of the Treasury, Bureau of Customs, transmitted findings to the state unemployment insurance agency which gave as the reasons for separation from service 1) termination during probation; and 2) dringing of an alcoholic beverage within twenty-four hours of flying.

5. On or about February 17, 1972, the Industrial Commissioner of the State of New York made an initial determination disallowing unemployment insurance benefits to me on the grounds that I had drunk an alcoholic beverage within twenty-four hours of departure time for a flight and that the federal findings were conclusive. (See copy of Notice of Determination attached hereto as Exhibit "A".)

6. The aforesaid Notice of Determination advised me that I had the right to a hearing but at the same time I was told that the facts found by the Department of the Treasury, Bureau of Customs were final, conclusive and binding.

7. On February 17, 1972, I requested a hearing from the state unemployment insurance agency on the ground that the termination of my employment was unfair, I was

denied a hearing by the federal agency, and I had not committed the act alleged.

8. As a probationary employee of the Treasury Department, Bureau of Customs, I had a limited right of appeal to the Civil Service Commission on the issue of my termination, an appeal which was confined to consideration of charges of discrimination and improper procedure. § 315.80 6, Civil Service Regulations. This appeal was not available to challenge the federal findings as they might relate to claims for unemployment insurance.

9. I had never been accused of any misconduct until receipt of the notice of termination, and had no reason to believe that I would be so accused.

10. I have been grievously harmed by being denied unemployment benefits without a fair hearing in that I was deprived of a source of income which I sorely needed after I was separated from federal employment without due process of law.

11. On information and belief, I would not have been denied unemployment insurance benefits if I had been given a fair hearing and an opportunity to challenge the federal findings in my case because I was and am innocent of the charges which led to my dismissal and believe I could prove that in impartial hearing.

12. I believe that there are other persons similarly situated to myself who have been denied unemployment compensation for federal employees upon disputed federal findings without being given a fair hearing, and that I can fairly represent the class of such persons.

/s/ Victor L. Green
VICTOR L. GREEN

[Notary Omitted]

EXHIBIT A TO GREEN AFFIDAVIT:
NOTICE OF DETERMINATION

NEW YORK STATE DEPARTMENT OF LABOR
Division of Employment

NOTICE OF DETERMINATION TO CLAIMANT

Local Office
Address

Victor L. Green
1547 Commonwealth Ave.
Bronx, N. Y. 10460
Apt. B1

☒ Given
☐ Mailed
Date 2/17/72

516-46-7380
S.S. Acct. No.

No unemployment insurance benefits can be paid to you for the period beginning 2/19/71 until you have subsequently worked for an employer not less than 3 days in each of 4 weeks or earned at least $200. Self-employment and earnings from self-employment will not count.

DETERMINATION [Hand Written] You were fired for misconduct in connection with your employment.

NOTICE OF DETERMINATION TO CLAIMANT

Local Office
Address

Victor L. Green
1547 Commonwealth Ave.
Bronx, N. Y. 10460
Apt. B1

☒ Given
☐ Mailed
Date 2/17/72

516-46-7380
S.S. Acct. No.

No unemployment insurance benefits can be paid to you for the period beginning 2/19/71 until you have subsequently worked for an employer not less than 3 days in each of 4 weeks or earned at least $200. Self-employment and earnings from self-employment will not count.

DETERMINATION — [Hand Written] You were fired for misconduct in connection with your employment.

REASON — This determination is based on the following: [Hand Written] You drank an alcoholic beverage within 24 hours of departure time for a flight. Sky marshalls are not permitted to drink within 24 hours prior to flying.

RENEWING YOUR CLAIM — If you are satisfied that this determination is correct, you may apply to renew your claim by reporting to this local office if you are unemployed and believe that you have satisfied the above requirement of subsequent work or earnings.

RIGHT TO A HEARING — IF YOU ARE NOT SATISFIED WITH THIS DETERMINATION, YOU MAY ASK FOR A HEARING BEFORE AN IMPARTIAL REFEREE AT NO COST OR OBLIGATION TO YOU.

REQUEST FOR HEARING — HOWEVER, YOUR REQUEST MUST BE MADE IN PERSON OR BY MAIL AT THIS LOCAL OFFICE NOT LATER THAN 30 DAYS FROM THE DATE OF THIS NOTICE.

When requesting a hearing, be sure to bring or mail your Insurance Book, Insurance Book Calendar Insert and Claim Card, if issued, with your request.

REPORTING — TO PROTECT YOUR RIGHTS until the referee decides the case, CONTINUE TO REPORT to your insurance and employment offices on your assigned days as long as you remain unemployed.

FOR THE INDUSTRIAL COMMISSIONER

By [Illegible]

(over)

LO 412.1 (9-69)

81

[Caption and Title Omitted]

ANSWER OF FEDERAL DEFENDANTS DEPARTMENT OF LABOR, JAMES D. HOGDSON, POSTAL SERVICE CORPORATION, ELMER T. KLASSEN CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON, AND JAYNE SPAIN TO THE AMENDED COMPLAINT—Filed March 28, 1972

The defendants, United States Department of Labor, James D. Hodgson, United States Postal Service Corporation, Elmer T. Klassen, United States Civil Service Commission, Robert E. Hampton, James E. Johnson, Jayne Spain, by their attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York for their answer to the complaint as amended:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the complaint, except deny the allegations insofar as they purport to state a rule of law respecting the requirement of providing a fair hearing.

2. Deny the allegations contained in paragraph 2 of the complaint.

3. Admit the allegations of the first sentence of Paragraph 3 of the complaint and deny the allegations of the second sentence.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of the complaint.

5. Admit the allegations of Paragraph 5 of the complaint except deny that the statutes referred to deny a fair hearing as alleged.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the complaint.

7. Admit the allegations of Paragraph 7 of the complaint except deny those allegations that refer to a denial of a right to a fair hearing.

8-14. Admit the allegations of Paragraphs 8 through and including Paragraph 14 of the complaint.

15. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 of the complaint.

16. Admit the allegations of Paragraph 16 of the complaint.

17. Deny the allegations contained in Paragraph 17 of the complaint, except state that plaintiff Christian is a former federal employee.

18. Admit the allegations of Paragraph 18 of the complaint.

19-20. Deny the allegations of Paragraphs 19 and 20 of the complaint, and state that plaintiff Christian was discharged by reason of her total record of unsatisfactory conduct of which the instances mentioned in Paragraphs 19 and 20 were a part.

21-22. Admit the allegations of Paragraphs 21 and 22 of the complaint.

23. Deny the allegations of Paragraph 23 of the complaint, except deny knowledge and information sufficient to form a belief as to what the basis of the initial determination was.

24-28. Admit the allegations of Paragraphs 24 through and including Paragraph 28.

29. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29 of the complaint.

30. Admit the allegations of Paragraph 30 of the complaint.

31. Admit the allegations of Paragraph 31 of the complaint, but state further that plaintiff never requested a hearing.

32-34. Admit the allegations of Paragraphs 32 through and including Paragraph 34 of the complaint.

35-45. Deny knowledge or information sufficient to form a belief as to the allegations of Paragraphs 35 through and including Paragraph 45 of the complaint.

46-50. Deny the allegations of Paragraph 46 through and including Paragraph 50 of the complaint.

First Affirmative Defense

51. This Court lacks jurisdiction over the subject matter of this action.

Second Affirmative Defense

52. The complaint fails to state a cause of action upon which relief may be granted.

Third Affirmative Defense

53. State that plaintiff was dismissed from probationary federal employment for cause.

WHEREFORE, defendants demand judgment dismissing this action together with the costs and disbursements of this action, and such other and further relief as this court deems justified.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for defendants United
States Postal Service Corporation, Klassen, United States
Labor Department, Hodgson,
United States Civil Service Commission, Hampton, Johnson
and Spain

By: /s/ Taggart D. Adams
TAGGART D. ADAMS
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: (212) 264-6335

[Caption and Title Omitted]

ANSWER OF THE STATE DEFENDANTS TO THE AMENDED COMPLAINT—Filed April 10, 1972

The defendants, NEW YORK STATE DEPARTMENT OF LABOR and LOUIS L. LEVINE (hereinafter "State defendants") by their attorney LOUIS J. LEFKOWITZ, Attorney General of the State of New York, for their answer to the complaint as amended:

FIRST: Deny the allegations of paragraph "1" insofar as they purport to state a rule of law respecting the requirements of providing a fair hearing and insofar as they claim that the State defendants do not provide such a hearing.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "3" except deny that plaintiff Christian was denied a fair hearing and admit that she was denied unemployment insurance benefits.

THIRD: Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "4" except deny that plaintiff Green was denied a fair hearing and admit that he was denied unemployment insurance benefits.

FOURTH: Admit the allegations of paragraph "5" except deny that the State defendants deny a fair hearing.

FIFTH: Admit the allegations of paragraph "6".

SIXTH: Admit the allegations of paragraph "7" except deny that the State defendants deny a fair hearing.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "8" through and including paragraph "16".

EIGHTH: Deny the allegations in paragraph "17" except state that plaintiffs are former federal employees who were found by the State defendants not to be entitled to unemployment insurance benefits.

NINTH: Admit the allegations of paragraph "18".

TENTH: Deny the allegations of paragraphs "19" and "20" except state that plaintiff Christian was discharged in part because of the reasons set forth in those paragraphs.

ELEVENTH: Admit the allegations of paragraphs "21" and "22".

TWELFTH: Deny the allegations of paragraph "23" except state that the initial determination was based in part on Post Office Department reports.

THIRTEENTH: Admit the allegations of paragraphs "24" and "25".

FOURTEENTH: Deny the allegations of paragraph "26".

FIFTEENTH: Admit the allegations of paragraph "27" except state that referees and the Appeal Board are not under the jurisdiction of the Division of Employment.

SIXTEENTH: Admit the allegations of paragraphs "28" and "29".

SEVENTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "30" and "31".

EIGHTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph "32" and admit the second sentence thereof.

NINETEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "33".

TWENTIETH: Deny the allegations of paragraph "34" except state that the Board is bound by the federal agency's findings of fact with respect to the reasons for termination.

TWENTY-FIRST: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "35" and "36".

TWENTY-SECOND: Admit that the allegations of paragraph "37" constitute at least part of the reason for termination.

TWENTY-THIRD: Admit the allegations of paragraphs "38" and "39" except state with respect to paragraph "39" that the initial determination was issued on February 17, 1972 effective as of December 19, 1971.

TWENTY-FOURTH: Deny the allegations of paragraph "40" except state that the initial determination was based in part on Treasury Department reports.

TWENTY-FIFTH: Admit the allegations of the first sentence of paragraph "41". Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph "41".

TWENTY-SIXTH: Deny knowledge and information sufficient to form a belief as to the truth of the allegations of paragraphs "42" through "44".

TWENTY-SEVENTH: Deny the allegations of paragraphs "45" through "50".

FIRST AFFIRMATIVE DEFENSE

TWENTY-EIGHTH: This Court lacks jurisdiction over the subject matter of this action.

SECOND AFFIRMATIVE DEFENSE

TWENTY-NINTH: The complaint fails to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

THIRTIETH: In cases involving the termination (as distinguished from the resignation) of federal probationary employees, the State defendants are bound by the findings of fact of the federal employer as to the reasons for termination. 5 U.S.C. § 8506; 20 C.F.R. §§ 609.9 *et seq.* (as amended to July, 1971).

WHEREFORE, defendants demand judgment dismissing this action together with the costs and disbursements of this action, and such other and further relief as this court deems justified.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
New York State Department
of Labor and Levine

By: /s/ Brenda Soloff
BRENDA SOLOFF
Assistant Attorney General
80 Centre Street
New York, New York 10013
Tel: (212) 488-7402

[Caption and Title Omitted]

PLAINTIFFS' NOTICE OF MOTION FOR SUMMARY JUDGMENT OR FOR THREE-JUDGE COURT AND SUMMARY JUDGMENT —Filed April 17, 1972

SIRS:

PLEASE TAKE NOTICE that upon the attached Motion and Statement of Undisputed Material Facts attached thereto and upon the Pleadings and Affidavits filed in the above-entitled matter, the Plaintiffs will move this Court, in Room 506 of the United States Courthouse, Foley Square, New York, New York, on the 2nd day of May, 1972, at 10:00 A.M. or as soon thereafter as counsel can be heard, for an Order:

(1) Granting Plaintiffs' motion for summary judgment and a preliminary and permanent injunction enjoining the Defendants from enforcing and following 5 U.S.C. § 8506 and 20 C.F.R. § 609.18 and § 609.25 insofar as said statute and regulations deny fair hearings to former federal employees determined ineligible for unemployment compensation benefits under the Unemployment Compensation for Federal Employees (UCFE) Program or; in the alternative,

(2) Granting Plaintiffs' motion for the convening of a three-judge court and for summary judgment and a preliminary and permanent injunction enjoining the Defendants from enforcing and following 5 U.S.C. § 8606 and 20 C.F.R. § 609.18 and § 609.25 insofar as said statute and regulations deny fair hearings to former federal employees determined ineligible for unemployment compensation benefits under the Unemployment Compensa-

tion for Federal Employees (UCFE) Program.

Dated: April 14, 1972
New York, New York

Yours, etc.

[Attorneys and Addresses Omitted]
Attorneys for Plaintiffs

TO:

WHITNEY NORTH SEYMOUR, JR.
TAGGART D. ADAMS
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

LOUIS J. LEFKOWITZ
BRENDA SOLOFF
New York State Attorney General
80 Centre Street
New York, New York 10013

[Caption and Title Omitted]

STATEMENT OF MATERIAL FACTS AS TO WHICH PLAINTIFFS CONTEND THERE IS NO GENUINE ISSUE TO BE TRIED

In support of the foregoing motion for summary judgment, and pursuant to Rule 9(g) of the Rules of the United States Court for the Southern District of New York, Plaintiffs submit the following Statement of Material Facts as to which Plaintiffs contend there is no genuine issue to be tried:

1. Plaintiff Jean Christian is a resident of Brooklyn, New York, and a former employee of the United States Post Office in Brooklyn, New York. (Christian Affidavit ¶ 1, ¶ 2.; Federal Answer One, ¶ 3 ¶ 18.)

2. Plaintiff Victor L. Green is a resident of Bronx, New York, and a former employee of the United States Department of the Treasury, Bureau of Customs, based in New York. (Green Affidavit ¶ 1, ¶ 2.)

3. Defendant New York State Department of Labor, Division of Employment is the agency responsible for the administration of unemployment insurance in the State of New York and is a party to an agreement with the United States Department of Labor pursuant to 5 U.S.C. §§ 8501 *et seq.* which authorize the payment of unemployment insurance benefits to Federal employees. (Federal Answer One ¶ 5; State Answer ¶ 4.)

4. Defendant Louis L. Levine is the Industrial Commissioner of the New York State Department of Labor, Division of Employment, and is responsible for the administration of unemployment insurance in the State of New York. (New York Labor Law §§ 10, 530; State Answer ¶ 5.)

5. Defendant United States Department of Labor is the agency responsible for the administration of unemployment insurance benefits for the administration of unemployment insurance benefits for Federal employees under 5 U.S.C. §§ 8501 *et seq.* and has entered into an agreement with the New York State Department of Labor, Division of Employment, pursuant to 5 U.S.C.

§§ 8501 *et seq.* which authorize the payment of unemployment insurance benefits to Federal employees. (Federal Answer One ¶ 7; State Answer ¶ 6.)

6. Defendant James D. Hodgson is the Secretary of the United States Department of Labor and is responsible for the administration of unemployment insurance for Federal employees. (Federal Answer One ¶ 8.)

7. Defendant United States Postal Service Corporation assumed all obligations and liabilities of the United States Post Office Department, which is the former employer of Plaintiff Christian and, pursuant to 5 U.S.C. § 8506 and the regulations promulgated thereunder by the Department of Labor, it transmitted information to the Defendant Division of Employment concerning the reason for the termination of Plaintiff Christian's employment. (Federal Answer One ¶ 9.)

8. Defendant Elmer T. Klassen is Postmaster General of the United States Postal Service Corporation and is responsible for the transmission of information to State unemployment insurance agencies such as the Defendant Division of Employment. (Federal Answer One ¶ 10.)

9. Defendant United States Civil Service Commission (hereafter the "Civil Service Commission") is responsible for the administration and regulation of working and termination procedures for Federal employees. (Federal Answer One ¶ 11.)

10. Defendant Robert E. Hampton is the Chairman of the United States Civil Service Commission and, in conjunction with Defendants Johnson and Spain, is responsible for the administration of Federal employee procedures. (Federal Answer One ¶ 12.)

11. Defendant James E. Johnson is a Commissioner of the United States Civil Service Commission and, in conjunction with Defendants Hampton and Spain, is responsible for the administration of Federal employee procedures. (Federal Answer One ¶ 13.)

12. Defendant Jayne Spain is a Commissioner of the United States Civil Service Commission and, in conjunction with Defendants Hampton and Johnson, is responsible for the administration of Federal employee procedures. (Federal Answer One ¶ 14.)

13. Defendant United States Department of the Treasury is the former employer of Plaintiff Victor L. Green, and pursuant to 5 U.S.C. § 8506 and the regulations promulgated thereunder by the Department of Labor, it transmitted information to the Defendant Division of Employment concerning the reason for the termination of Plaintiff Green's employment. (Green Affidavit ¶ 2, ¶ 4.)

14. Defendant John Connally is the Secretary of the United States Department of the Treasury, and is responsible for the transmission of information to State unemployment insurance agencies such as the Defendant Division of Employment. (Federal Answer One ¶ 16.)

15. Plaintiff Christian was a probationary employee with the United States Post Office Department from April 4, 1970, to October 2, 1970. (Christian Affidavit ¶ 2; Federal Answer One ¶ 18; State Answer ¶ 9.)

16. On October 2, 1970, Plaintiff Christian was discharged by the Post Office Department allegedly because of a record of unsatisfactory conduct which included an unsatisfactory attendance record. (Christian Affidavit ¶ 3, ¶ 4; Federal Answer One ¶ 19, ¶ 20.)

17. Plaintiff Christian filed a valid original claim with the Defendant Division of Employment under the Unemployment Compensation for Federal Employees (UCFE) Program, 5 U.S.C. §§ 8502, 8506, on October 3, 1970. (Christian Affidavit ¶ 3; Federal Answer One ¶ 21; State Answer ¶ 11.)

18. By initial determination effective October 3, 1970, the Defendant Division of Employment ruled that Plaintiff Christian was disqualified because she had voluntarily left her employment without good cause by provoking her discharge. (Christian Affidavit ¶ 5, Exhibit A; Federal Answer One ¶ 22; State Answer ¶ 11.)

19. This initial determination was based on reports made by Post Office Department stating that Plaintiff Christian's employment was terminated during her probationary period because of her unsatisfactory attendance record and her absences on August 31 and September 1, 1970 without notifying the Post Office Department as to such absences. (Christian Affidavit ¶ 4.)

20. The initial determination was reversed by Referee Milton Weinstein of the Division of Employment on January 8, 1971, after a full hearing in which the Industrial Commissioner and the Plaintiff were heard. (Christian Affidavit ¶ 9, ¶ 10; Federal Answer One ¶ 24; State Answer ¶ 13.)

21. Referee Weinstein found that:

> "Claimant's parental responsibilities required her absence from work on August 31 and September 1. Having had the employer advised of the reason for her absence she did not willfully act in a manner to provoke her discharge. She did not voluntarily leave her employment."
>
> (Christian Affidavit, Exhibit B; Federal Answer One ¶ 25; State Answer ¶ 13.)

22. Referee Weinstein did not accord "final and conclusive" weight to the findings of the Post Office Department as required by 5 U.S.C. § 8506. (Federal Answer One ¶ 26.)

23. An appeal was taken from the Referee's decision to the Appeal Board of the New York State Department of Labor. The Board is charged with review of determinations by the Referees. (Christian Affidavit ¶ 11, Exhibit C; Federal Answer One ¶ 27; State Answer ¶ 15.)

24. The New York State Department of Labor, Division of Employment, Appeal Board did not afford Plaintiff Christian a hearing concerning the reasons for her termination. (Federal Answer One ¶ 34.)

25. The New York State Department of Labor reversed Referee Weinstein's *de novo* findings and decision and upheld the initial determination. In its decision, dated April 16, 1971, the Appeal Board stated that it was bound, under 5 U.S.C. § 8506, by the Federal agency's findings and that Plaintiff Christian had provoked her discharge, which was tantamount to a voluntary leaving of employment without good cause. (Affidavit of Christian, Exhibit D; Federal Answer One ¶ 28, ¶ 34; State Answer ¶ 16.)

26. The decision of the Appeal Board is final on all questions of fact under New York unemployment insurance law. (State Answer ¶ 16.)

27. By Act of Congress effective primarily on July 1, 1971, the United States Post Office Department became the Defendant United States Postal Service Corporation, under which Act the latter assumed all the obligations and liabilities of the former, and under which Act the latter remains a Federal agency bound by the requirements of 5 U.S.C. § 8506 and the regulations promulgated thereunder. (Federal Answer One ¶ 30.)

28. Plaintiff Christian was not afforded a hearing by the Defendant Civil Service Commission. (Christian Affidavit ¶ 8; Federal Answer One ¶ 31.)

29. Plaintiff Christian was not afforded a hearing by either the Post Office Department or the Department of Labor. (Federal Answer One ¶ 32.)

30. Plaintiff Green was a probationary employee with the Defendant United States Department of the Treasury from December 24, 1970, to December 18, 1971. (Green Affidavit ¶ 2, ¶ 3.)

31. During his employment, Plaintiff Green was based in New York as a skymarshall for the Bureau of Customs of the Defendant Department of the Treasury. (Green Affidavit ¶ 2.)

32. Effective December 18, 1971, Plaintiff Green was discharged by the Defendant Department of the Treasury for the alleged reason of drinking an alcoholic beverage within twenty-four hours of flying. (Green Affidavit ¶ 2, ¶ 3, ¶ 4.)

36. Plaintiff Green received a Notice of Determination from the Defendant State Department of Labor, Division of Employment, which advised him that he had been disqualified from receiving benefits, and that he had a right to a hearing before the Division of Employment. He was also advised orally, however, that the findings of fact made by the Defendant Department of the Treasury were final and conclusive upon the Defendant New York State Department of Labor, Division of Employment. (Green Affidavit ¶ 6, Exhibit A; Green Affidavit ¶ 6.)

37. The Defendant New York State Department of Labor, Division of Employment, treats as final and conclusive pursuant to 5 U.S.C. ¶ 8506 the reasons for termination of employment submitted to it by Federal government agencies, pursuant to 5 U.S.C. ¶¶ 8501 *et seq.* (State Answer ¶¶ 20, 30.)

38. Plaintiff Green was not afforded a hearing by the Defendant Civil Service Commission. (Green Affidavit ¶ 8.)

39. The total number of Federal employees hired in New York State during the fiscal year June, 1970, to June, 1971, was approximately 35,450. (Stipulation attached as Exhibit B to Plaintiffs' Class Action Motion.)

40. The first year of employment of a Federal employee who is given career or career-conditioned employment is a probationary period. The probationary period is one year. (5 C.F.R. § 315.801, § 315, 802.)

41. The employing Federal agency may terminate the employment of a probationary Federal employee by notifying the employee about its conclusions as to why he is being separated from employment and about the effective date of the action. (5 C.F.R. § 315.804.)

42. A probationary Federal employee has no right to appeal the termination, and is given no hearing on the grounds for termination of employment unless the employee alleges that the termination was based upon discrimination because of race, color, religion or sex, political reasons, martial status, discrimination because of a physical handicap, or improper procedure not in accordance with 5 C.F.R. § 315.805. (5 C.F.R. § 315.806.)

43. Each Federal agency is required to make available to State unemployment compensation agencies information concerning the reasons for termination of Federal service of former Federal employees. (5 U.S.C. § 8506(a).)

44. Within four work days after receipt from a State unemployment compensation agency of a form noting the application of a former Federal employee for unemployment compensation benefits under the UCFE Program, a Federal agency is required to ascribe and transmit its

Federal findings to the State agency or other appropriate person. (20 C.F.R. § 609.6(a).)

45. Under Federal authority as interpreted and applied by the New York State Department of Labor, Division of Employment, Federal findings are final and conclusive on the State agency, except where a Federal civilian employee has contradicted the reasons alleged for his *resignation* and has not received a hearing on the issues involved in the alleged reasons for *resignation*. (5 U.S.C. § 8506; 20 C.F.R. § 609.18(a), as amended, July 20, 1971; *Smith* v. *District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), *on remand*, No. 2232-68 (D.D.C. Feb. 1, 1971); State Answer ¶ 30.)

46. Pursuant to United States Department of Labor regulations providing for a limited *ex parte* review by the Federal agency of the Federal findings, there is no provision for nor right to a hearing. (20 C.F.R. § 609.23; Federal Answer One ¶ 33.)

47. Federal findings are treated as not subject to review by the New York State Department of Labor, Division of Employment, while other determinations and redeterminations are available for review under the State unemployment compensation law. (20 C.F.R. § 609.25, as amended, July 20, 1971; State Answer ¶ 20.)

48. Fair hearings on all issues of fact are made available by the New York State Department of Labor, Division of Employment to all non-Federal employees and to other persons who are dissatisfied with an initial determination of a claim for benefits. (New York Labor Law § 620.)

49. In the UCFE Program in the State of New York for the year 1971, there were 8,184 original claims for benefits under the Regular Program (excluding Extended benefits) by former Federal employees of these original claims there were 5,276 non-monetary determinations and redeterminations of *ineligibility* for benefits. (64.7% of all original claims were denied.) Of the claims denied, 1,952 were for reasons of voluntary quit without

good cause, and 96 were for misconduct. (Stipulation attached as Exhibit A to Plaintiffs' Class Action Motion.)

Dated: April 14, 1972
New York, New York

Respectfully submitted,

[Attorneys and Addresses Omitted]

Attorneys for Plaintiffs

[Caption and Title Omitted]

FEDERAL DEFENDANTS' NOTICE OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT—Filed May 12, 1972

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit, statement pursuant to Rule 9(g), and memorandum of law, the undersigned will move this Court, at a motion part thereof, held in Room 506, United States Courthouse, Foley Square, New York, New York, on the 23rd day of May, 1972 at 10:00 A.M. or as soon thereafter as counsel may be heard, for an order pursuant to Rule 12(c) of the Federal Rules of Civil Procedure to dismiss this action, or, in the alternative, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment to the federal defendants named in plaintiffs' amended complaint, and such other and further relief as may be deemed just and equitable.

Dated: New York, New York
May 12, 1972

Yours, etc.

[Attorneys and Addresses Omitted]

United States Attorney for the
Southern District of New York

TO:

DENNIS R. YEAGER, ESQ.
E. RICHARD LARSON, ESQ.
423 W. 118th Street
New York, New York 10027

LOUIS J. LEFKOWITZ
BRENDA SOLOFF
80 Centre Street
New York, New York 10013

[Caption and Title Omitted]

STATEMENT OF MATERIAL FACTS AS TO WHICH THE FEDERAL DEFENDANTS CONTEND THERE IS NO GENUINE ISSUE TO BE TRIED

1. The federal defendants accept and hereby incorporate the Statement of Material Facts submitted by the plaintiffs.

2. The plaintiffs, Christian and Green, were separated from federal employment pursuant to and in accordance with the provisions of 5 C.F.R. § 315.804.

Respectfully submitted,

[Attorneys Omitted]

United States Attorney for the
Southern District of New York

EXHIBIT B TO STATEMENT OF MATERIAL FACTS:
NOTICE OF SEPARATION TO VICTOR L. GREEN

December 14, 1971

PER:4
EG:lm

Mr. Victor L. Green
Customs Security Officer, GS-5

Dear Mr. Green:

This letter constitutes a notice to you that you will be separated from the Customs Service on December 18, 1971, in accordance with Part 315 of the Civil Service Regulations for disqualification during your probationary period, for the following reasons:

You were assigned for duty on Tokyo flight Northwest Airlines 21 and 22 from August 28 to September 1, 1971. Prior to reporting for duty at approximately 1:00 a.m., on August 28, 1971, you were observed in an intoxicated condition at the pool of your apartment, the Skylark Apartments. Although the swimming pool at the apartments closed at 10:00 p.m., you jumped the fence surrounding it, yelling and shouting and then jumped into the pool wearing only your jockey shorts. When the manager appeared and requested you to leave, you began screaming at him.

In addition, during the Tokyo flight Northwest Airlines 21 and 22 you had difficulty staying awake because of your personal activities prior to departure.

A few hours prior to leaving on a Tokyo flight on September 3, 1971, you also drank an alcoholic beverage.

Your drinking an alcoholic beverage within 24 hours of departure on assignments was contrary to instructions given to Customs Security Officers. In addi-

tion, your actions were disgraceful, and demonstrated a lack of responsibility and dependability.

Within 15 calendar days from the effective date of this action, you may appeal this decision to terminate your appointment to the Regional Director, New York Region, U.S. Civil Service Commission, Federal Building, 26 Federal Plaza, New York, N.Y. 10007. Your appeal may be based on the grounds that the action was taken because of political reasons not required by statute, or that it resulted from discrimination because of race, color, religion, sex, national origin, marital status or physical handicap. If you allege discrimination, you must submit an affidavit stating your reasons for believing there was such discrimination.

If you desire further information on how to proceed with your appeal, you may contact Mr. E. Grossi, Employee Relations Specialist, telephone number (212) 264-5173/5174, Room 726, U.S. Customhouse, New York, New York 10004, for further explanation.

Please sign, date and return the accompanying copy of this notice, so that it may serve as your acknowledgement of the original.

Very truly yours,

JOHN W. FALLON
Special Agent in Charge

EXHIBIT C TO STATEMENT OF MATERIAL FACTS:
UNITED STATES CIVIL SERVICE COMMISSION
DENIAL OF APPEAL TO VICTOR L. GREEN

UNITED STATES CIVIL SERVICE COMMISSION

NEW YORK REGION

Comprising New York, New Jersey,
Puerto Rico and the Virgin Islands

Office of the Director, New York, New York 10007

Director New York Region
U.S. Civil Service Commission
Federal Building
26 Federal Plaza
New York, N.Y. 10007

In Reply Please
Refer To
NY:A:BG:js

Mr. Victor L. Green
c/o Morrisania Legal Services
1438 Boston Road
Bronx, New York 10460

Dear Mr. Green:

Reference is made to your and your representative's letters of December 30, 1971 and January 18, 1972 concerning your recent employment with U.S. Bureau of Customs, New York, New York.

Our inquiry disclosed that you were notified by letter, dated December 14, 1971, signed by John W. Fallon, Special Agent in Charge, that you would be separated from your position of Customs Security Officer GS-5 because of drinking an alcoholic beverage within 24 hours of departure on assignments, etc. Accordingly, your services were terminated effective December 18, 1971.

Section 315.804 of the Civil Service Regulations applies to the action taken in your case. It provides that if an agency decides to terminate an employee serving a probationary period because his work performance or conduct fails to demonstrate his fitness or qualifications for continued federal employment, his services will be terminated by notifying him in writing as to why he is being terminated and the effective date of the action. This

regulation does not provide for any appeal to the Civil Service Commission by a probationary employee on the basis of his inadequate performance or conduct on the job.

After carefully considering all the pertinent information of record in your case, we find that the action taken by your agency is not within the purview of the Civil Service Commission's appellate jurisdiction. It is noted in your letter you state that the grounds upon which you are appealing is that the charges which formed the basis of the dismissal are wholly false and untrue; however, as to the merits of your case, we have previously indicated that they are not subject to review by the Civil Service Commission. In view of the above, your appeal cannot be accepted.

Unless this decision is further appealed within 15 days of the date it is received, it becomes the final decision of the Civil Service Commission.

Two copies of any further appeal should be addressed to the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415. Any representations which the Board should consider beyond those now in the appeal file must be submitted in writing. Please send two copies. In addition, notify this office of the filing of any further appeal so that the appeal file can be sent promptly to the Board.

FOR THE REGIONAL DIRECTOR

Sincerely yours,

BERT GANSER
Appeals Examiner

cc:
Mr. Eric Rundbaken
Morrisania Legal Services
1433 Boston Road
Bronx, New York 10460

Special Agent in Charge
Department of Treasury
Bureau of Customs
New York, New York 10014

[Caption and Title Omitted]

ANSWER OF FEDERAL DEFENDANTS DEPARTMENT OF THE TREASURY AND JOHN CONNALLY TO THE AMENDED COMPLAINT—Filed May 16, 1972

The defendants, the United States Department of the Treasury and John Connolly, by their attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York for their answer to the complaint as amended:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the complaint, except deny the allegations insofar as they purport to state a rule of law respecting the requirement of providing a fair hearing.

2. Deny the allegations contained in paragraph 2 of the complaint.

3. Admit the allegations of the first sentence of Paragraph 3 of the complaint and deny the allegations of the second sentence.

4. Admit the allegation of the first sentence and deny knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of Paragraph 4 of the complaint.

5. Admit the allegations of Paragraph 5 of the complaint except deny that the statutes referred to deny a fair hearing as alleged.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the complaint.

7. Admit the allegations of Paragraph 7 of the complaint except deny those allegations that refer to a denial of a right to a fair hearing.

8-16. Admit the allegations of Paragraphs 8 through and including Paragraph 16 of the complaint.

17. Deny the allegations contained in Paragraph 17 of the complaint, except state that plaintiffs Christian and Green are former federal employees.

18. Admit the allegations of Paragraph 18 of the complaint.

19-20. Deny the allegations of Paragraphs 19 and 20 of the complaint, and state that plaintiff Christian was discharged by reason of her total record of unsatisfactory conduct of which the instances mentioned in Paragraphs 19 and 20 were a part.

21-22. Admit the allegations of Paragraphs 21 and 22 of the complaint.

23. Deny the allegations of Paragraph 23 of the complaint, except deny knowledge and information sufficient to form a belief as to what the basis of the initial determination was.

24-28. Admit the allegations of Paragraphs 24 through and including Paragraph 28.

29. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29 of the complaint.

30. Admit the allegations of Paragraph 30 of the complaint.

31. Admit the allegations of Paragraph 31 of the complaint, but state further that plaintiff never requested a hearing.

32-34. Admit the allegations of Paragraphs 32 through and including Paragraph 34 of the complaint.

35-36. Admit the allegations of Paragraphs 35 through and including Paragraph 36 of the complaint.

37. Admit the allegations of Paragraph 37 and state that further instances of misconduct were reasons for the discharge of Green.

38-39. Admit the allegations of Paragraphs 38 through and including Paragraph 39 of the complaint.

40. Admit the allegations of Paragraph 40 and state that further instances of misconduct were reasons for the discharge of Green.

41. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 41 of the complaint.

42-44. Admit the allegations of Paragraphs 42 through and including Paragraph 44 except state plaintiffs apparently mean the Department of the Treasury in the fourth line of Paragraph 43.

45. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 45 of the complaint.

46-50. Deny the allegations of Paragraph 46 through and including Paragraph 50 of the complaint.

First Affirmative Defense

51. This Court lacks jurisdiction over the subject matter of this action.

Second Affirmative Defense

52. The complaint fails to state a cause of action upon which relief may be granted.

Third Affirmative Defense

53. State that plaintiffs were dismissed from probationary federal employment for cause.

WHEREFORE, defendants demand judgment dismissing this action together with the costs and disbursements of this action, and such other and further relief as this court deems justified.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for defendants United States Postal Service Corporation, Klassen, United States Labor Department, Hodgson, United States Civil Service Commission, Hampton, Johnson, and Spain, United States Department of the Treasury, and John Connolly

By: /s/ Taggart D. Adams
TAGGART D. ADAMS
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: (212) 264-6335

[Caption and Title Omitted]

ORDER CONVENING THREE-JUDGE COURT
—Filed May 24, 1972

It appearing that on May 24, 1972, the undersigned referred this cause to the Chief Judge of the Circuit for the convening of a court of three judges pursuant to Title 28 U.S.C. §§ 2282 and 2284;

It further appearing that by an order dated May 24, 1972, of Hon. Henry J. Friendly, Chief Judge of the United States Court of Appeals for the Second Circuit, Hon. Paul R. Hays, United States Circuit Judge, Hon. Arnold Bauman, United States District Judge, and the undersigned were designated to hear and determine said cause; it is hereby

ORDERED that a hearing of the pending motions before the aforesaid three Judges shall be held at 10:30 A.M. on June 8, 1972, in Room 906, United States Courthouse, Foley Square, New York, New York; and it is further

ORDERED that counsel for each party, in addition to making timely service of papers to be considered by the court, is required to arrange that a set of legible copies of all papers thus served and filed shall be delivered to the chambers of each of the aforesaid three Judges not later than 1:00 P.M., on June 5, 1972.

Dated: New York, New York
May 24, 1972

/s/ Marvin E. Frankel
U.S.D.J.

[Caption and Title Omitted]

STATUTORY NOTICE OF THREE-JUDGE COURT
—Filed May 25, 1972

SIRS:

Pursuant to the provisions of Title 28, United States Code, Sections 2282 and 2284, you are hereby notified that by an order dated May 24, 1972, made by the Honorable Marvin E. Frankel, a hearing has been set by a three-judge court composed of the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Marvin E. Frankel and Honorable Arnold Bauman, United States District Judges, for the 8th day of June, 1972, at 10:30 A.M. in Courtroom 906, United States Courthouse, Foley Square, New York, New York.

Counsel are directed to comply with the provisions of General Rule 25 of this Court and with the provisions contained in the order dated May 24, 1972, signed by the

Honorable Marvin E. Frankel, a copy of which order is hereto annexed.

Dated: New York, New York
May 25, 1972

/s/ John Livingston
Clerk

TO: Attorney for Plaintiff

DENNIS R. YEAGER and
E. RICHARD LARSON
423 West 118th St.
New York, NY 10027

Attorneys for Defendants

HON. LOUIS J. LEFKOWITZ (for
N.Y. State Dep't. of Labor &
Louis L. Levine)
SAMUEL A. HIRSCHOWITZ and
BRENDA SOLOFF, of Counsel
80 Centre St., NYC 10013

WHITNEY NORTH SEYMOUR, JR. (for
Federal Defendants)
TAGGART D. ADAMS, of Counsel
U.S. Courthouse
Foley Square, NYC 10007

Attorney General of the United States
Department of Justice
Washington, D.C.

HON. NELSON A. ROCKEFELLER
Governor of the State of N.Y.
Executive Mansion, Albany, N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civ. 5556

(Three Judge Court)

JEAN CHRISTIAN and VICTOR L. GREEN, individually and on behalf of all others similarly situated, PLAINTIFFS

—against—

NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT; its Industrial Commissioner, LOUIS L. LEVINE; UNITED STATES DEPARTMENT OF LABOR, its Secretary, JAMES D. HODGSON; UNITED STATES POSTAL SERVICE CORPORATION; its Post-Master General, ELMER T. KLASSEN; UNITED STATES CIVIL SERVICE COMMISSION; its Chairman, ROBERT E. HAMPTON, and its Commissioners, JAMES E. JOHNSON and JAYNE SPAIN; UNITED STATES DEPARTMENT OF THE TREASURY; and its Secretary, JOHN CONNALLY, DEFENDANTS

BEDFORD-STUYVESANT COMMUNITY LEGAL SERVICES CORP., by Ruth Balen, Esq.; BRONX LEGAL SERVICES CORPORATION A, by Eric Rundbaken, Esq.; and Dennis R. Yeager, Esq. and E. Richard Larson, Esq., Attorneys for Plaintiffs.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, by Samuel A. Hirshowitz and Brenda Soloff, Assistant Attorneys General, for Defendants New York State Department of Labor and Louis L. Levine.

WHITNEY NORTH SEYMOUR, JR., United States Attorney for the Southern District of New York, by Taggart T. Adams, Assistant United States Attorney, for Federal Defendants.

Before HAYS, C.J., FRANKEL and BAUMAN, D.J.

OPINION—Filed July 24, 1972

BAUMAN, D.J.

This action tests the constitutionality of the Federal statutory scheme providing unemployment compensation

benefits for former Federal employees as it is applied to those who at the time of termination of their Federal employment were in a probationary status. The principal issue is whether the provisions of 5 U.S.C. § 8506 [1] and the regulations promulgated thereunder, which make the findings of the former Federal employer as to the reasons for termination binding and conclusive upon the State agency in its determination of eligibility for unemployment compensation benefits, violate the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment.

This case came on before Judge Frankel for declaratory relief, injunctive relief and a writ of mandamus. As the constitutionality of a Federal statute was seriously in doubt, Judge Frankel invoked a Three-Judge Court pursuant to 28 U.S.C. § 2282.

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[1] 80 Stat. 589, 5 U.S.C. § 8506 provides in pertinent part:

"(a) Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

(1) whether or not the Federal employee has performed Federal service;

(2) the periods of Federal service;

(3) the amount of Federal wages; and

(4) the reasons for termination of Federal service.

The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provisions for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c) of this title."

I.

Plaintiff Jean Christian is a resident of Brooklyn, New York and a former employee of the United States Post Office[2] in Brooklyn. Plaintiff Victor L. Green is a resident of the Bronx, New York and a former employee of the United States Department of The Treasury, Bureau of Customs, based in New York. Both plaintiffs were probationary employees when their employment was terminated. Plaintiff Christian was employed by the Post Office Department from April 4, 1970 to October 2, 1970 and was discharged because of an unsatisfactory attendance record. Plaintiff Green was a sky marshal for the Bureau of Customs from December 24, 1970 to December 18, 1971, when he was discharged for drinking an alcoholic beverage within twenty-four hours of flying. Neither plaintiff was given a prior hearing nor was one required.

Title 5 U.S.C. § 8501 et seq.[3] authorizes the United

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[2] Defendant United States Postal Corporation assumed all the liabilities of the United States Post Office Department pursuant to 84 Stat. 738, 39 U.S.C. § 2002.

[3] 80 Stat. 586, amended 81 Stat. 218, 5 U.S.C. § 8502 provides in pertinent part:

"(a) The Secretary of Labor, on behalf of the United States, may enter into an agreement with a State, or with an agency administering the unemployment compensation law of a State, under which the State agency shall—

(1) pay, as agent of the United States, compensation under this subchapter to Federal employees; and

(2) otherwise cooperate with the Secretary and with other State agencies in paying compensation under this subchapter.

(b) The agreement shall provide that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be paybale to him under the unemployment compensation law of the State if his Federal service and Federal wages assigned under section 8504 of this title to the State had been included as employment and wages under that State law.

(d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to

States Department of Labor to enter into agreements with State agencies to provide unemployment compensation for former Federal employees under the Unemployment Compensation for Federal Employees (UCFE) Program. Its statutory scheme includes a provision that the written statement of the former Federal employer as to the reasons for termination of an employee are binding and conclusive on the State agency which administers the UCFE program. 5 U.S.C. § 8506. Such an agreement was entered into by the Secretary of Labor and the State of New York. Both plaintiffs filed claims for unemployment compensation with the New York State Department of Labor which is the administering agency. After proceeding through the appropriate State procedures each plaintiff received a final determination denying them benefits based on the written, conclusive statements of their former Federal employers.

As probationary employees, neither plaintiff was entitled to a hearing before their Federal agency employer prior to termination of their employment.[4] Therefore, neither had an opportunity to contest, avoid or rebut the written reasons for their dismissal. Because the Federal findings were binding on the State agency, plaintiffs claim that they have been denied unemployment compensation benefits without due process of law and in violation of their rights to equal protection of the laws.

II.

Prior to addressing the constitutional questions, this Court must face the statutory claim[5] that the interpre-

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review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent."

[4] Compare 5 U.S.C. § 7532(c) with 5 C.F.R. §§ 315.804, 315.805, 315.806.

[5] The Supreme Court in *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970) stated that a three judge court should consider any statutory claim prior to considering the constitutional claim. See also *King* v. *Smith*, 392 U.S. 309 (1968).

tation of 5 U.S.C. § 8506 set forth in *Smith* v. *District Unemployment Compensation Board*, 435 F.2d 433 (D.C. 1970) is the correct one. If that is so, mandamus will lie against the Federal officials directing them to provide a hearing regarding the reasons for termination, upon request, to those probationary employees whose employment with a Federal agency is ended.

We refuse to follow the construction of 5 U.S.C. § 8506 set forth in *Smith*, supra. That Court found—

> "There is no reasonable basis for supposing that whereas Congress deliberately insisted on opportunity of hearing for employees generally, it deliberately established a no-hearing enclave for a relatively small group of Federal employees . . . ." *Supra* at 438.

In reaching that conclusion, we think that the Court ignored the structure of the Federal Civil Service Laws. Since the original Civil Service Act of 1883, Congress has made a distinction between probationary and permanent Government employees.[6] Probationary employees are not entitled to the full range of hearing rights to which permanent employees are entitled upon dismissal.[7] This distinction between probationary and permanent Government employees has been recognized by the Courts on many occasions[8] and Congress surely was aware of it in 1954 when it passed the legislation creating the UCFE Program.

Certainly the Congress intended that Federal employers should have an unfettered right to terminate probationary employees up to the time such employees acquire permanent status. No termination hearing is prescribed or required nor should it be. What *Smith*, supra, attempts is to legislate judicially a hearing not now required by statute which would mandate precisely the type of hearing not now required for discharge. Such a hearing, as

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[6] 5 U.S.C. § 3321.

[7] See footnote 4, supra.

[8] See, e.g., *Jaeger* v. *Freeman*, 410 F.2d 528 (5th Cir. 1969), *Medoff* v. *Freeman*, 362 F.2d 472 (1st Cir. 1966).

a practical matter, would limit the Government in the discharge of probationary employees to an extent never previously contemplated by the Congress.

Additionally, the idea that the use of the word "findings" in 5 U.S.C. § 8506 means "findings after a hearing" is a tortured, strained and unnecessary interpretation. We hold that the word "findings" in 5 U.S.C. § 8506 means only the written statement of reasons for termination sent by the Federal employer to the State agency administering the UCFE program. Had the Congress meant otherwise it would have said so.

III.

Having disposed of the statutory claim, the Court must now proceed to the constitutional claims. In this connection, defendants have interposed the threshhold defense of lack of subject matter jurisdiction and in the case of the Federal defendants must be sustained.

The only statutory basis for jurisdiction over the dispute between the plaintiffs and the Federal defendants alleged in the complaint is 28 U.S.C. § 1361, the mandamus remedy, which has been found lacking in merit, supra.

In their complaint plaintiffs have not met the jurisdictional requirements under 28 U.S.C. §§ 1331, 1337 or 1346, the so-called "federal question" jurisdiction sections. As neither the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, nor the provisions for invoking a Three-Judge Court, 28 U.S.C. § 2282, provide subject matter jurisdiction in and of themselves, an additional statutory basis must be alleged. There are no such allegations. The so-called "civil rights" jurisdictional provisions, 42 U.S.C. § 1983 and 28 U.S.C. § 1343, apply to State, not Federal officials.

However, the situation is different as to the State defendants. Plaintiffs have properly based their claim on 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The gist of the complaint against the State defendants is that their application of the Federal law in administering the UCFE

program has denied the plaintiffs of unemployment compensation benefits without due process of law and in violation of their right to equal protection of the laws.

Ayala v. *District 60 School Board*, 327 F.Supp. 980 (D. Colo. 1971) illuminates the issue. As the Court there said (at p. 981):

> "Since plaintiffs in this action claim that their right to equal protection of the laws has been denied by Colorado officials, acting in their capacities as officials, this court clearly has jurisdiction to hear the constitutional claim and, should plaintiffs be successful, to grant the relief sought. It makes no difference that plaintiffs have not cited a state or local law upon which the defendants' conduct may be based. It is settled that the phrase 'under color of' comprehends all official behavior, even that which is patently unlawful under state, as well as federal, law."

IV.

The State defendants assert that the alleged constitutional violations claimed by plaintiffs do not state a claim upon which relief can be granted. We agree.

Plaintiffs urge that the State defendants, in applying 5 U.S.C. § 8506 to deny them unemployment compensation benefits without a hearing, have violated the equal protection clause of the Fourteenth Amendment. That violation allegedly results from treatment of former probationary employees in a discriminatory and irrational manner from all other applicants for unemployment compensation.

To reiterate what we have previously stated, Congress had good reason to differentiate between probationary and permanent employees in trying to promote the efficient disposition of Federal business. As the purpose of such classification was legitimate and the means adopted by Congress were rational, there is no denial of equal protection. Cf. *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

The other constitutional issue is whether a denial of unemployment compensation benefits without a hearing violates the due process clause of the Fourteenth Amendment. This depends upon striking a balance between the loss to the claimant resulting from a denial of such a hearing and the Government's interest in summary adjudication of claims. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). In *Goldberg*, supra, the Supreme Court held that an evidentiary hearing was required before welfare payments could be terminated, but the factual distinctions between *Goldberg* and the case at bar highlight the conclusion that the Government's interest in summary adjudication outweighs plaintiffs' need for a hearing here.

Welfare programs, such as aid to families with dependent children,[9] are designed to meet a different need than unemployment compensation. Such payments are designed to provide the recipient with essential food, clothing and shelter. *Goldberg*, supra, at 264. Need is *not* the criterion for eligibility under the unemployment compensation programs.[10] Compensation is available as a matter of right to involuntarily unemployed workers and benefits are based on wages previously received by the claimant without relation to need. In fact, if an unemployed person is declared ineligible for unemployment compensation benefits he may nonetheless qualify for welfare payments on the basis of his need. The plain fact is that unemployment compensation benefits are not of the same urgent nature to the survival of the claimant as are welfare benefits.

Goldberg, supra, also holds that recipients *already receiving* benefits were entitled to a hearing before termination of those benefits. In the case at bar plaintiffs have not received benefits but have only applied for them. In fact, a three-Judge panel of this Court has held that the suspension or termination without a prior hearing of *unemployment compensation benefits* already being paid

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[9] 49 Stat. 627, as amended, 42 U.S.C. §§ 601-610.

[10] See N.Y. Labor Law §§ 590, 591 (McKinney's 1972 Supp.) which sets forth the rights and eligibility requirements for unemployment compensation in New York.

without a prior hearing is not violative of the Fourteenth Amendment. *Torres* v. *New York State Department of Labor*, 321 F.Supp. 432 (S.D.N.Y. 1971), *vacated and remanded*, 402 U.S. 968 (1971), *previous decision adhered to*, 333 F.Supp. 341 (S.D.N.Y. 1971). That Court pointed out that the "brutal need" of the welfare recipients in *Goldberg* was not present in circumstances involving recipients of unemployment compensation. The same Government interests of an orderly and summary procedure for the efficient operation of the unemployment compensation program which were present in *Torres*, are present here. On balance, the interests of the Government outweigh plaintiffs' need for a hearing and so, the due process claim cannot be sustained.

Given the above disposition of the case it is not necessary to reach a decision as to whether plaintiffs' suit is properly brought as a class action. The action is dismissed.

SO ORDERED.

Dated: July 24, 1972

/s/ Arnold Bauman
U.S.D.J.

/s/ Paul R. Hays
U.S.C.J.

U.S.D.J.

FRANKEL, D.J. (dissenting):

My difference with the majority is not on the questions of constitutional law, which I would not reach. Instead, on grounds like those set out in *Smith* v. *District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), I would hold as a matter of statutory construction that the plaintiffs and other federal probationary employees like them are entitled to at least a rudimentary hearing somewhere on "findings" asserted to bar their claims for unemployment compensation.

Dealing as we do here with related statutes enacted at widely separate times, our problem is one on which differences respecting general principles of interpretation may be decisive. Such statutes, though intended to be interconnected, often fail to mesh with automatic precision. The same words or phrases may take varied colors from their varying contexts. Words defining classes of people or things may later need expansive readings to avoid omissions that must fairly be deemed inadvertent, cf. *Flora* v. *United States*, 362 U.S. 145 (1960), or constricted interpretations to avoid a literally required inclusion offensive to informed reason and good sense, cf. *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). The administration of such measures for the faithful implementation of legislative purposes is among the more challenging and creative of the tasks entrusted to judges. There is no formula that tells how much of literalism and how much of other things may be required for the particular case. The work calls truly for judgment in a field that has fairly been described as being "not a science but an art."[1]

In the instant case, though most respectfully, I think the majority has followed literal meaning and syntax to the point of mistakenly sacrificing goals dominant in the statutory scheme. Specifically, today's decision excludes a small group of federal employees from the basic right to be heard when (1) Congress evidenced its ex-

[1] Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259 (1947).

press purpose to make that right available to all employees, private or public, (2) Congress likewise evinced the aim of avoiding second-class citizenship for federal employees with respect to the elemental need for a dignified form of wage substitute in times of unemployment, (3) the great bulk of federal employees are in fact upon a substantial par with private workers in having an opportunity to contest factual determinations which, if adverse, may preclude unemployment compensation, (4) the deprived group, probationary employees, appears not to have been specially noticed during the legislative process, and certainly not to have been singled out for the special deprivation to which it is today held subject, and (5) the opposite result from the majority's, more consonant with the deep commitment of our jurisprudence to fair hearings as prerequisites to adverse determinations, is readily reconcilable with the text and essential objects of the pertinent statutory provisions. These thoughts are elaborated in what follows.

(1) From the inception of the federal legislation for federal funding, and limited federal supervision, of state unemployment compensation programs, one of the few requirements binding the States was that their laws include provision for

> "[o]pportunity for a fair hearing before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied * * *." Social Security Act of 1935, § 303(a)(3), 49 Stat. 626, 42 U.S.C. § 503(a)(3).

At the time of that enactment, almost 40 years ago, our notions of fair procedure embraced a far less sweeping insistence upon the right to be heard than is prevalent today. The emphasis in the statute, moreover, was on broad latitude for state legislative preferences in "all matters in which uniformity is not absolutely essential."[2] Even in those circumstances, the right of a "fair hearing" was enshrined as a requisite of suitably "high

[2] Message of the President, Jan. 17, 1935, H.Doc. No. 81, 74th Cong., 1st Sess., p. 16.

administrative standards"[3] for the envisioned state unemployment compensation programs.

(2) Almost 20 years after providing for workers in private industry, the Congress created the program of unemployment compensation for federal employees, out of which the present case arises. An obvious and explicit impulse, if somewhat belatedly followed, was the concern for elementary fairness. "[T]he Federal Government should not be in the position of providing less favorable conditions of employment than are required of private employers."[4] For federal as well as private employees, under either of the alternative plans Congress provided, an employee denied compensation was (and is) to be given a "fair hearing." 5 U.S.C. §§ 8502(b), 8503(c).

We come, however, to 5 U.S.C. § 8506(a), upon which the present controversy centers. As set out in Judge Bauman's opinion for the court, the "findings" there designated, including those concerning "the reasons for termination of Federal service," are declared to be "final and conclusive for the purpose of sections 8520(d) and 8503(c) * * *." The question before us is whether adverse "findings" which may operate to bar unemployment compensation are thus foreclosed from inquiry anywhere for the narrow group of employees who have never had any opportunity to contest them.[5]

(3) When Congress wrote the provisions before us for "federal employees," it drew no distinction between per-

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[3] *Id.* at 4.

[4] S. Rep. No. 1794, 83d Cong., 2d Sess., in 3 U.S. Code, Cong. & Ad. News 3891, 3894 (1954).

[5] More precisely, plaintiff Jean Christian did have a hearing before a state hearing officer, and she prevailed—i.e, the reason asserted for her dismissal (and denial of unemployment compensation) was determined upon airing to be unfounded. In the view now sustained by a majority of this court, however the hearing officer was held on an administrative review to have erred in hearing Miss Christian at all, and the denial of compensation payments was held to follow from the untested "finding" of the federal employer.

manent and probationary workers. Neither the statute nor its history suggests that anyone had such a distinction, or its possible consequences, in mind.[6] The great majority of federal employees are, of course, those in the permanent category. The prototypical civil servant, the one we are likely to envision when thinking in the global concepts of legislators, is in this group. Given that reality, and given the familiar procedures governing the separation of permanent civil servants, it is reasonable to infer that the "findings" declared "final and conclusive" were conceived as those affecting, and resulting from procedures affecting, permanent civil servants.

The very word "findings" buttresses this inference. If it is not inescapably true, the word commonly refers to resolutions or determinations following deliberations upon evidence in a manner of which the judicial process is the ideal case. See Black's Law Dictionary 758 (4th ed. 1957), citing cases. If the probable image is not always of a full-scale trial "hearing," it is certainly not of the simple assertion of a "fact" or merely "the conclusory statement of a result" where there has been no opportunity for countervailing presentations and no pretense of considering two sides. *Coleman* v. *Brucker*, 257 F.2d 661, 662-663 (D.C. Cir. 1958); *Sims* v. *Greene*, 161 F.2d 87, 89 (3d Cir. 1947). And if the word "findings" means anything more than such untested declarations, it was an apt term for permanent civil servants, but not apt at all for probationary people.

For decades before the enactment of UCFE in 1954, permanent civil servants had a right to contest, and to make presentations opposing, grounds asserted for their dismissal. While the Lloyd-LaFollette Act, August 24,

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[6] I am a long way from sharing the confidence of the majority that Congress "surely was aware" of this distinction at the time of the passage of the UCFE. It is always a risky business to detect sure awareness in a busy Congress where the subject appears never to have been mentioned. The assumption would be arguable if the UCFE legislation had been under the charge of the committee in either house concerned with civil service affairs. That was not the case, however; the responsible committees handling UCFE were House Ways and Means and Senate Finance.

1912, § 6, 37 Stat. 555, as amended, 5 U.S.C. § 7501(b), gave (and gives) no full-scale trial hearing, it required notice and charges in writing, a reasonable time to answer in writing, opportunity to file affidavits and at least an opportunity to seek discretionary grant of a hearing. Executive regulations implementing these rights have continued to expand them. Without tracking every detail, there was a right in 1954 (when the UCFE was enacted) to a written decision stating "the reasons for the action taken and its effective date." 5 C.F.R. § 9.102 (a)(1) (1949). Beginning in 1962, with Executive Order No. 10987, 27 F.R. 550 (Jan. 18, 1962), permanent employees have had a right to a full "hearing" to contest dismissals, either at the agency stage or on appeal. See 5 C.F.R. § 771.101 *et seq.* (1972).

(4) Thus, for the overwhelming majority of federal employees, those in the permanent service, the findings declared "final and conclusive" under § 8506(a) have at all times been reached after at least some opportunity for contest. No such opportunity has existed at any time for the probationary employee. Our question is whether plain language or anything else compels the harsh result of denying such an employee unemployment compensation (no question is raised as to the finality of his federal termination) on grounds he has never had a chance to refute.

It is not possible to say with assurance that the "plain language" of § 8506(a) requires a decision against the plaintiffs. The term "findings" fits at best crudely the ex parte declarations upon which plaintiffs were dismissed. But, neatly or not, the word does fit. If textual analysis were the whole of our responsibility, plaintiffs would probably deserve to lose. However, almost everything else germane to our problem points the other way.

(5) The strikingly inferior position to which plaintiffs have thus far been relegated for unemployment compensation purposes was never decreed—and seems never to have been considered as a prospect—by the Congress. The explicit purpose of putting public and private employees on a par applies at least as much to probationary workers (whose employment is more pre-

carious) as to permanent workers for purposes of insurance against unemployment. The powerful impetus in our law favoring the right to be heard weights against the denial of such a right said to be required by a semantic analysis so rickety as that erected upon the word "findings" in the present context. The concern for "uniformity" of federal "findings," which appears to have prompted the finality provision, is scarcely grazed by allowing a state hearing officer to find out with some decent measure of reliability whether (solely for unemployment compensation purposes) the federal probationary employee in fact drank when he should not have or was improperly absent without reporting.[7]

The arguments against the majority's conclusion acquire at least some modest support from the constitutional arguments that gave birth to this three-judge court. Though the arguments are today rejected, neither of my distinguished brethren suggests that the issues thus decided lack substance. Thus, the construction I would adopt has the merit of avoiding constitutional doubt. *United States* v. *Thirty Seven Photographs*, 402 U.S. 363, 369 (1970); *Schneider* v. *Rusk*, 390 U.S. 17, 27 (1968); *United States* v. *Rumely*, 345 U.S. 41, 45

[7] The majority says a hearing solely for unemployment compensation purposes "as a practical matter, would limit the Government in the discharge of probationary employees to an extent never previously contemplated by Congress." It should be stressed, therefore, that nobody claims a right of the probationary employee to test his *discharge* in a hearing. The only question is as to the availability of a hearing (given to everyone else, public or private) on eligibility for unemployment compensation. When the majority speaks of what is foreseen "as a practical matter," it evidently reflects the concern, exhibited in arguments to us for defendants, that the prospect of a hearing—even though not testing the discharge or capable of doing so—would make supervisors in the employing agencies timorous about discharging probationary people. This is a regrettable position. Insofar as it is accurate, it portrays a regrettable situation. We ought not to be so "practical" that we fashion legal judgments upon the premise that federal officials commonly fire people upon grounds so tenuous that they would not dare order the firings if they thought someone, somewhere else, without authority to reverse the firings, might so much as air the asserted grounds.

(1953). More specifically, it is pertinent to recall analogous areas where the Supreme Court has avoided constitutional doubt by discovering upon analysis that the word "final" in a statute should not always be construed to foreclose further review of a disputed question. *Estep* v. *United States*, 327 U.S. 114, 122, 127-28 (1945); *Chin Yow* v. *United States*, 208 U.S. 8 (1908) (Holmes, J.)

Finally, it is worth stressing that we deal with a class of necessitous people claiming the benefits of broadly remedial legislation. If there is doubt about the statutory meaning—and I urge at least that, recalling, *inter alia*, a unanimous D.C. Circuit ruling in conflict with the present majority—it ought to be resolved with liability toward those for whom the benefit was created. Cf. *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932); *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968); *United States* v. *Udy*, 381 F.2d 455, 456 (10th Cir. 1967); *Phoenix Assurance Co. of N.Y.* v. *Britton*, 289 F.2d 784, 786 (D.C. Cir. 1961). See also *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200 (1952).

I would grant judgment for the plaintiffs sustaining their right to a "fair hearing," like the right of private compensation claimants, unless they are offered a prompt hearing, only for purposes of compensation, by the federal agencies in which they were formerly employed. Cf. *Smith* v. *District Unemployment Compensation Board*, *supra*, 435 F.2d at 438-39.

/s/ Marvin E. Frankel
MARVIN E. FRANKEL
U.S.D.J.

[Caption and Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 30, 1972

Notice is hereby given that Jean Christian and Victor L. Green, the Plaintiffs in the above-entitled action, hereby appeal to the Supreme Court of the United States from the final order, entered in this action on July 24, 1972, denying Plaintiffs' requested relief and dismissing the complaint.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
September 12, 1972

[Attorneys and Addresses Omitted]

Attorneys for the Plaintiffs

SUPREME COURT OF THE UNITED STATES

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN, APPELLANTS

v.

NEW YORK STATE DEPARTMENT OF LABOR,
DIVISION OF EMPLOYMENT, ET AL.

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 16, 1973

SUPREME COURT OF THE UNITED STATES

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN, APPELLANTS

v.

NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT, ET AL.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 16, 1973

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